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LAW, AUTONOMY, AND LOCAL GOVERNMENT:
A LEGAL HISTORY OF MUNICIPAL CORPORATIONS
IN CANADA WEST/ONTARIO, 1850-1880

MARY MARGARET PELTON STOKES

A DISSERTATION SUBMITTED TO
THE FACULTY OF GRADUATE STUDIES
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY

GRADUATE PROGRAM IN LAW
YORK UNIVERSITY
TORONTO, ONTARIO

October, 2018

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Abstract

The historiography of local government in mid-nineteenth century Canada West/Ontario is divided on the question of municipal autonomy. The more dominant thesis asserts that the Municipal Corporations (Baldwin) Act of 1849 ushered in a period of freedom for municipalities. The second depicts the Act as oppressive of autonomy in the interests of economic development. Both interpretations are based largely on extrapolation from earlier and later periods; there have been no direct examinations of local governance in Canada West/Ontario for what may be considered its formative period, from 1850 to 1880. In addition, much that has been written has been conceptually anachronistic, conflating ‘local’ with ‘urban’ in an era when the province was primarily rural. And, significantly, the legal dimension of the subject has been ignored or relied on uncritically.

I begin with an examination of the Act and its consolidations to determine whether it was essentially permissive or mandatory, concluding that it can best be described as a constitution for ‘low’ governance. I then consider case-law, focussing on enforcement of municipal duties by mandamus, restriction on municipal action by quashing of by-laws, and the imposition of liability for negligence. Next, I consider the communication of official sources of law to local government actors through commercial publications, all of which emphasized the lack of local autonomy. Because counties were the most populous local units, I use the archival records of the United Counties of Leeds and Grenville to scrutinize the activities of one such local government ‘in the shadow of the law.’ I then discuss the supervision of local government by the old-regime, ‘soft law’ grand jury, and the new-regime ‘hard law’ prison inspectorates. I investigate whether the newly created township councils were able to express community norms through the property tax appeal process. Finally, I consider the influence of municipal councils over their legal environment by means of petitions to the provincial legislature.

I conclude that local governments in Canada West/Ontario during the years 1850 to 1880, while not without agency, were both too integrated in and too integral to the low governance of the province to be autonomous.

Acknowledgements

Any dissertation has numerous contributors. The number of years in the writing and research has a multiplier effect, so that a dissertation which has taken as many years this one has should include so many expressions of gratitude that the length of the acknowledgments might rival that of one of the chapters. Everyone who believed in me and my project has my gratitude, but I have had to restrict these acknowledgements to those who have provided the greatest degree of assistance, inspiration and encouragement.

My supervisor, Eric Tucker, and supervisory committee members (and former teachers) Paul Craven and Doug Hay, have been insightful and patient mentors. Paul Craven also provided the data management programme I use for everything, and helped me learn how to use it. I have benefitted immensely from the guidance and compassion of Liora Salter and other Graduate Programme Directors at Osgoode Hall Law School during my time there, as well as the graduate programme staff, especially Lisa Bunker and Chantel Thompson. The law librarians and staff at Osgoode Hall Law School, especially Judy Ginsberg, Balfour Halévy, Wayne Mah, Monica Perot, and Marianne Rogers, have been unfailingly obliging,

Constance Backhouse and Jim Phillips provided references which re-opened the doors of the academy I thought I had shut forever, and both have continued to encourage and inspire me. Jim Phillips also provided me with opportunities to present drafts of all my substantive chapters to the Osgoode Society (formerly Toronto) Legal History Workshop, and together with other members of the group gave me useful feedback. The late Graham Parker first sparked my interest in legal history. My first supervisor, David Flaherty, hired me as his research and editorial assistant and introduced me to the legal history world. J.J. (Jack) Quinn suggested municipal law as a promising topic for legal-historical inquiry. The directors of the Osgoode Society for Canadian Legal History awarded me the R. Roy McMurtry Fellowship, a psychological as well

as material boost; I thank them and Roy McMurtry and the donors. The society also provided a research grant to travel to Ottawa. Osgoode Hall Law School and York University have my gratitude for various scholarships and the opportunity to teach several subjects in law and socio-legal studies.

Other teachers and fellow travellers in law, history, and legal history made the path smoother and/or the journey more enjoyable, including (but not restricted to!): Harry Arthurs, the late Blaine Baker, the late John Beattie, Blake Brown, Lyndsay Campbell, Lori Chambers, Michael Cross, Adam Dodek, Shelley Gavigan, Philip Girard, Roger Hall, Sarah Hamill, Allan Hutchinson, Elizabeth Koester, Trish McMahon, Jeff McNairn, Brad Miller, Mary Jane Mossman, Christopher Moore, James Muir, the late Peter Oliver, Bruce Ryder, Karen Schucher, A.I. Silver, Lorne Sossin, Jennifer Stephen, Almos Tassyoni, Mariana Valverde, and Peer Zumbansen. Thank you to all.

Finally, I am grateful to many friends for their moral support over the years, especially the late Viera Barta, Charlotte Goldfried, the late Stan Greben, Heather Sampson, and Donna Williams; and to my family: my husband, John Legge, my children, James, Elizabeth, and Rosemary Legge, my sister, Barbara Stokes, my late father, F.C. Stokes, and my late mother-in-law, Laura Legge. All have been understanding, uncritical and kind. My daughter Elizabeth also helped immeasurably by transcribing, proof-reading, editing, and formatting.

Most generous of all with material and emotional support was my late mother, Doris Gertrude Stokes, née Brown, who instilled a love of history in me from an early age, and who never stopped believing in me. I'm sorry she is not here to see me reach the end. This dissertation is dedicated to her memory.

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Chapter 1: Toward a Legal History of Municipal Corporations in Canada West/Ontario, 1850-1880

In such histories of municipal governance as there have been in Ontario, the leitmotif has been local autonomy. Indeed, the presence or absence, increase or decrease, of municipal independence has been a pervasive theme in local government studies in general. Autonomy has a certain a priori value; some degree is necessary if local government is to be both *local* and *government*.¹ The question also has political import: local autonomy interests those concerned with the robustness of contemporary local democracies and their alleged potential for advancing goals of environmentalism and social justice.² These critics have often used history to bolster the normative argument that local (by which they almost always mean urban) governments should have autonomy because they are best placed and/or most likely to advance a progressive agenda.

Ironically, the perceived lack of local autonomy in present-day Ontario is often decried by progressives by means of a conservative narrative, as a derogation from a system that was ostensibly designed to prioritize local community decision-making. For urban historians, the premise that Ontario local governments were designed to be independent by the Municipal Corporations (Baldwin) Act of 1849 is also a basis for implicit and explicit criticisms of mid-Victorian municipal councils as pro-business and anti-welfare, on the supposition that this orientation was a matter of (impliedly poor) choice.³ These assumptions are mostly extrapolated

¹ See *inter alia*, George Jones and John Stewart, *The Case for Local Government* 2nd ed. (London, Boston: Allen & Unwin, 1985), especially 6.

² For one such plea for greater local autonomy for progressive social purposes see Ron Levi and Mariana Valverde, "Freedom of the City: Cities and the Quest for Governmental Status," *Osgoode Hall Law Journal* 44, no. 3 (2006): 409-59. For a contrary (and contrarian) view see Andrew Sancton, *The Limits of Boundaries: Why City Regions Cannot be Self-Governing* (Montreal: McGill-Queen's Press, 2008).

³ *Municipal Corporations (Upper Canada) Act*, 12 Vic. c.81 (1849) [hereafter *Municipal Act*]. This act was/is also known as the Baldwin Act after its main proponent, the moderate reformer Robert Baldwin; see for example Stephen Speisman, "Munificent Parsons and Municipal Parsimony: Voluntary vs. Public Poor Relief in Nineteenth Century Toronto," *Ontario History* 65 (1973): 32-49; Eric James Jarvis, *Mid-Victorian Toronto: Panic, Policy and*

from research on earlier and later periods. There have been no direct examinations of local governance in Canada West/Ontario for what may be considered its formative period, the thirty years beginning in 1850, the effective date of the Municipal Corporations Act of 1849, to 1880, the start of the period of progressive urban reform.⁴ In addition, much that has been written has been conceptually anachronistic, conflating ‘local’ with ‘urban’ in an era when the province was overwhelmingly rural. And, most significantly, the legal dimension of the subject has been either ignored or incorporated uncritically.

Many years ago, political theorist W. Hardy Wickwar recognized that “the political theory of local government is to a large extent identical with its legal philosophy,” but scholars have not always pursued the implications of this when examining local governance in its historical context.⁵ In the case of Upper Canada/Canada West/Ontario, that philosophy is legal positivism grounded in concepts of constitutional sovereignty.⁶ This sovereignty may be divided, as it has been in Canada at least since the advent of responsible government, between colony/province and imperial centre and/or nation. It may not be surrendered but may be delegated to subordinate, non-sovereign units such as local governments. In mid-Victorian

Public Response, 1857-1873 (Ph.D. diss., University of Western Ontario, 1979); Gilbert Arthur Stelter, "Urban Planning and Development in Upper Canada," in *Urbanization in the Americas: The Background in Comparative Perspective; Proceedings of Section VII, The Process of Urbanization*, ed. Woodrow Wilson Borah, Jorge Enrique Hardoy and Gilbert Arthur Stelter (Ottawa: History Division, National Museum of Man, 1980), 143-54.

⁴ The urban reform period in Ontario is held by one of its historians to have begun in 1880, by another not until 1890. Paul Rutherford, "'Tomorrow's Metropolis': The Urban Reform Movement in Canada, 1880-1920," in *The Canadian City: Essays in Urban and Social History*, ed. Gilbert Arthur Stelter and Alan F. J. Artibise (Ottawa: Carleton University Press, 1984), 203-1920; Paul Rutherford, *Saving the Canadian City, the First Phase 1880-1920: An Anthology of Early Articles on Urban Reform* (Toronto; Buffalo: University of Toronto Press, 1974); see also John C. Weaver, "'Tomorrow's Metropolis' Revisited: A Critical Reassessment of Urban Reform in Canada, 1890-1920," in *The Canadian City*, ed. G. A. Stelter and A. F. J. Artibise, 456-77.

⁵ W. Hardy Wickwar, *The Political Theory of Local Government*, 1st ed. (Columbia: University of South Carolina Press, 1970), vi.

⁶ On the union with Lower Canada in 1841, the colony of Upper Canada became legally Canada West, part of the Province of Canada, but continued to be referred to as Upper Canada. With confederation in 1867, it became Ontario, but was often still referred to as Upper Canada. The literature on sovereignty is vast; a good introduction is provided by Winston P. Nagan and Aitza M. Haddad, "Sovereignty in Theory and Practice," *San Diego International Law Journal* 13 (2012): 429-519.

Canada West/Ontario these were fashioned as municipal corporations—a particular legal format—and their autonomy, or lack thereof, must be understood in this context.⁷ As elected governments with democratic legitimacy but without constitutional sovereignty, Ontario municipal governments since 1850 have had an indeterminate politico-legal status that must inform and complicate any assessment of their autonomy.

In the settler society of late eighteenth- and early nineteenth-century Upper Canada, the template for local government generally followed the contemporary English county model. A few towns secured corporate status by intermittent special acts, but as a general rule locally based justices of the peace combined legislative and administrative roles with their judicial duties when they came together in Courts of General or Quarter Sessions to pass local regulations, set property tax assessment rates, and supervise subordinate officials.⁸ Much of this, the ‘old regime’ of law and local government, changed significantly at mid-century.⁹ The advent of responsible government and union of the Canadas transformed governance at the provincial level, while the District Councils Act of 1841, and ultimately the Municipal Act, 1849, achieved a comparable degree of change at the local level by transferring legislative and administrative

⁷ Municipal corporations are a subset of public corporations. In common law, public corporations shared with private corporations the trait of juristic personhood whereby a group is recognized as an undying individual separate from its membership. All corporations are confined to the objects, rules and parameters set out by their constituting documents (originally charters, later statutes). The public corporation is set apart by its public (i.e. not commercial) purpose and by its membership, which in the case of municipalities was and is defined by geography and other demographic characteristics, rather than by investment: see Walter Wheeler Cook, *Municipal Corporations* (Chicago: publisher not identified, 1914), 1-9.

⁸ See generally James K. Anderson, “The Court of General Sessions of the Peace: Local Administration in Pre-Municipal Upper Canada” (M.A. thesis, McMaster University, 1991), 78; David Eastwood, *Governing Rural England: Tradition and Transformation in Local Government 1780-1840* (Oxford; New York: Clarendon Press; Oxford University Press, 1994).

⁹ Margaret Banks declared 1849 the *annus mirabilis* of institutional legal reform in Canada West: Margaret A. Banks, “The Evolution of the Ontario Courts, 1788-1841,” in *Essays in the History of Canadian Law*, ed. David H. Flaherty, vol. 2 (Toronto: The Osgoode Society, 1983), 492–572, 511. The terminology of old and new regimes has been used effectively to explore nineteenth century Canadian institutional legal change by both John C. Weaver and Donald Fyson: John C. Weaver, *Crimes, Constables and Courts: Order and Transgression in a Canadian City, 1816-1970* (Montreal: McGill-Queen's University Press, 1995); Donald Fyson, *Magistrates, Police and People: Everyday Criminal Justice in Quebec and Lower Canada, 1764-183* (Toronto; Buffalo: Published for the Osgoode Society for Canadian Legal History by University of Toronto Press, 2006).

functions from the Courts of Quarter Sessions to elected councils.¹⁰ By the latter act, Canada West adopted a comprehensive scheme of mandatory municipal incorporation, the first Anglo-American jurisdiction to do so.¹¹

In this introductory chapter I first address issues of the autonomy of local governments in Canada West/Ontario during the years 1850-1880 that are raised directly or indirectly by the historiography, together with relevant scholarship pertaining to local government autonomy in the United States and England. Second, I review the analytic framework offered by political and feminist theory, and introduce the terminology of ‘legal environment’ and ‘low governance.’ Thirdly, I outline the various components of the project. Throughout, I make the argument that local autonomy is a complicated concept and its evaluation a problematic endeavour. Local government autonomy cannot and should not be separated from its historical and legal context. To say that local governments lacked autonomy from the passage of the Municipal Act has the effect of obscuring their agency and their importance as essential institutions of low governance; that is, the observation that municipal corporations were not autonomous in Canada West/Ontario during the period 1850-1880 is at once correct and misleading.

Historiography

English-Canadian historiographer Carl Berger castigated urban history as “the most lacking in coherence” of all areas of the (then) ‘new’ social history.¹² Berger diagnosed the problem as one

¹⁰ The British North America Act, 1840, 3 & 4 Vic. c.35 [Act of Union]; An Act to provide for the better internal Government of that part of this Province which formerly constituted the Province of Upper Canada, by the establishment of Local or Municipal Authorities therein, 4 & 5 Vic. c.10 [District Councils Act, 1841]. See generally J.M.S. Careless, *The Union of the Canadas: The Growth of Canadian Institutions* (Toronto: McClelland and Stewart, 1967).

¹¹ Zack Taylor, “If Different, Then Why? Explaining the Divergent Political Development of Canadian and American Local Governance,” *International Journal of Canadian Studies* 49, no. 2 (2014): 53–79.

¹² Carl Berger, *The Writing of Canadian History: Aspects of English-Canadian Historical Writing since 1900*, 2nd ed. (Toronto: University of Toronto Press, 1986), 316. Australian urban historian David Hamer anticipated the

of indiscriminate inclusivity.¹³ The phenomenon was not confined to Canada; according to Australian historian David Hamer, “urban history was about everything and about nothing,” giving rise, in his apt paraphrase of G. M. Trevelyan, to “social history with the rural areas left out.”¹⁴ However, despite this extended disciplinary reach, the history of local government in Ontario was “an obscure realm,” as Bryan Palmer stated the case in 1994.¹⁵ And so it has remained. Many Ontario localities have had their chroniclers, especially the cities. But place has trumped power, and the particular has been preferred to the general. Two periods of broad change—the development of municipal government from the founding of the settler colony to the passage of the Municipal Act, and the late nineteenth and early twentieth century progressive era—have attracted a number of studies, but other than a general picture of politicians committed to local ‘boosting,’ especially in competition for railways, and uncommitted to assisting the poor, we have scant information on local government during the thirty years following the passage of the Municipal Act. A topic one would have expected to be of central concern is remarkable for its absence under the “capacious umbrella” of urban history.¹⁶

Nor is this lacuna due to a lack of recognition of its importance. A number of historians of the political and social history of the province have attested to the significance of local government to the province, if only in passing. As far back as 1984, urban historians A.F.J. Artibise and Paul-André Linteau identified ‘control of the city’ as one of four major but

premature demise of his field: “a relatively new sub-discipline, urban history... [has begun] to collapse under the weight of its own popularity.” D. A. Hamer, *New Towns in The New World: Images and Perceptions of The Nineteenth-Century Urban Frontier* (New York: Columbia University Press, 1990), 3.

¹³ Berger, *The Writing of Canadian History*, 316-7.

¹⁴ Hamer, *New Towns in The New World*, 3. G. M. Trevelyan, *English Social History* (London, New York and Toronto, 1942), vii. (Social history being “history... with the politics left out.”)

¹⁵ Bryan D. Palmer, “Upper Canada,” in *Canadian History: A Reader's Guide*, ed. M. Brook Taylor (Toronto: University of Toronto Press, 1994), 230.

¹⁶ Hamer, *New Towns in The New World*, 3.

inadequately studied themes.¹⁷ The observation was repeated two years later by Artibise, this time with co-editor Gilbert Stelter, in the last of their several compilations of articles in urban history, *Power and Place*.¹⁸ The editors did include three essays on the subject of local government in this volume; two dealt almost exclusively with the twentieth century. The third, a slightly revised reprint from an earlier collection, is by default still the leading work on the immediate post-Baldwin Act period. John H. Taylor's article "The Evolution and Decline of Urban Autonomy in Canada" includes some three pages on the mid-nineteenth century, thereby amply, if unwittingly, illustrating Stelter and Artibise's assessment of paucity of material on the subject and its basis in the lack of interest by researchers.¹⁹

For the social historians who have dominated Canadian historiography for the last half century or so, history *in* the city is simply more interesting than history *of* the city.²⁰ As for non-urban communities, as rural Canadians have become more and more of a demographic minority, their history has similarly been marginalized; despite the efforts of Donald H. Akenson, rural history as a genre has never really captured the academic imagination.²¹ It might have been thought that the recent turn to the political would ignite interest in the history of local governance, but to a great extent the new politics of identity and the history it has inspired has been racial, gendered, and ethnic; trans-national and diasporic rather than infra-nationally focussed. Moreover, the predilection of historians to identify communities as urban or rural,

¹⁷ Alan F. J. Artibise and Paul André Linteau, *The Evolution of Urban Canada: An Analysis of Approaches and Interpretations* (Winnipeg: Institute of Urban Studies, University of Winnipeg, 1984), 46.

¹⁸ Gilbert Arthur Stelter and Alan F. J. Artibise, eds., *Power and Place: Canadian Urban Development in The North American Context* (Vancouver: University of British Columbia Press, 1986).

¹⁹ John H. Taylor, "Urban Autonomy in Canada: Its Evolution and Decline," in *Power and Place: Canadian Urban Development in the North American Context*, ed. Gilbert Stelter and Alan F. J. Artibise (Vancouver: University of British Columbia Press, 1986), 478-500.

²⁰ See for example, Stelter and Artibise, eds, *Power and Place*.

²¹ Donald H. Akenson, ed. *Canadian Papers in Rural History* (nine volumes) (Gananoque, Ont.: Langdale Press, 1978-1996).

categories that are socio-geographic rather than politico-legal, has tended to obscure the subject of local governance per se. Thus, municipal and urban have generally been treated as synonymous terms.

For the nineteenth century at least, this is an ahistorical elision. Despite the undeniable fact that urbanization out-stripped population growth throughout the nineteenth century, the majority of Ontarians lived in rural areas until well into the twentieth century.²² In 1851 the population of the province was approximately 86% rural, in 1881, 70 % rural.²³ It is also a distortion of a legal reality. With the exception of First Nations, and unincorporated districts in the sparsely settled northern reaches of the province, since 1850 all local governments in Ontario, whether rural or urban, have been municipal corporations. Though it may exist in different gradations—i.e. city, county, town, township and incorporated village, and more recently Regional Municipality—the municipal corporation, a hybrid of representative government and ‘fictitious person’—is a singular type of legal entity. Any exemptions or modifications for a particular place are considered procedurally and doctrinally to be exceptions to the general rule. From a legal perspective, a history of Ontario local government ‘with the rural areas left out’ is a contradiction in terms.

On the question of local autonomy, the urban historians, political scientists and geographers who have turned their attention to municipal government in mid-nineteenth century Ontario can be divided into two main camps. The first, those who suggest that the period

²² J. M. S. Careless, “Some Aspects of Urbanization in Nineteenth Century Ontario,” in *Aspects of Nineteenth Century Ontario*, ed. F. H. Armstrong (Toronto: University of Toronto Press, 1974), 65–79.

²³ The population of the province at 1851 was approximately 86% rural; in 1881, 70 % rural: Statistics Canada, *Population Urban and Rural, by Province and Territory (Ontario)*, <http://www40.statcan.ca/101/cst01/demo62g.htm>. The question of what counts as urban is legally defined, but arguable: See journalist Roy MacGregor on the shifting meaning of ‘urban’: “Can we really call a town without a stoplight ‘urban’?” *Globe and Mail*, 10 December 2007; Roy MacGregor, “This country: ideas: distance, density and the psychology of the metropolis,” *Globe and Mail*, 24 November 2007.

immediately following the Baldwin Act was a golden age of local independence, have generally done so straightforwardly. Those whose work raises doubts have tended to do so indirectly.

Although they may differ as to the indicators, the degree, the causes, and the ramifications of this autonomy, both groups share a degree of reliance on law, generally assumed to be evidenced by, and entirely composed of, the text of the municipal acts.

The first professional historian to consider the subject was Adam Shortt.²⁴ Writing in the early decades of the twentieth century, Shortt was in the vanguard of the liberal constitutional school of Canadian history, preoccupied with the development of jurisdictions and institutions.²⁵ His meticulous chronological summaries of legislation relating to early Ontario local government form a substantial part of the literature on the subject to date.²⁶ Shortt's conclusion, that the passage of the Municipal Act of 1849 government was the apogee of the provincial struggle for responsible government, was a reasonable one, given that the act's originator, Robert Baldwin, was a leader of the so-called moderate reformers who worked to bring responsible government to the colony as a whole.²⁷

As noted by J. W. Aitchison in a much cited dissertation written several decades later, this interpretation was supported by the rhetoric of Baldwin and others surrounding its passage.²⁸

²⁴ Amateur historians such as John George Bourinot and S. Morley Wickett had previously written to extol (the former) and denigrate (the latter) autonomous local government: John George Bourinot, *Local Government in Canada: An Historical Study* (Baltimore: Publication agency of the Johns Hopkins University, 1887), Samuel Morley Wickett, *Municipal Government in Canada* (Toronto: Librarian of the University of Toronto, 1907). For a discussion of early writers on municipal government in Canada see Engin Isin, "Rethinking the Origins of Canadian Municipal Government," *Canadian Journal of Urban Research* 4, no. 1 (1995):73-92.

²⁵ Berger, *The Writing of Canadian History*, 21-27.

²⁶ Shortt was author or co-author of a number of pamphlets and book chapters on the subject. See *inter alia*, Adam Shortt, "Municipal History, 1791-1914," in *Canada and Its Provinces: A History of the Canadian People and their Institutions*, vol. 17, ed A. Shortt and A. G. Doughty (Toronto: Brook and Co., 1914), 405-52.

²⁷ J. M. S. Careless, "Robert Baldwin," in *The Pre-Confederation Premiers: Ontario Government Leaders, 1841-1867*, ed. J. M. S. Careless (Toronto: University of Toronto Press, 1980), 89-147; Michael S. Cross and Robert L. Frasier, "Baldwin, Robert," *Dictionary of Canadian Biography*, http://www.biographi.ca/009004-119.01e.php?&id_nbr=3762&interval=25&&PHPSESSID=mg4k89hbbbsct5ehdc2ppj7l64.

²⁸ J. W. Aitchison, "The Development of Local Government in Upper Canada" (Ph.D. diss., University of Toronto, 1954).

Aitchison explicitly credited “strong democratic breezes from the south” as the reason for the enactment.²⁹ He found it particularly persuasive that the Baldwin Act’s dual omission of limits on local government taxing power and centralized management made for a clear rupture with the system set up by Lord Sydenham’s District Councils Act of 1841. Sydenham had begun the process of reform by replacing the administrative and governmental functions of the quarter sessions with a system of elected councils under a centrally- appointed Warden.³⁰ Shortt preferred this less democratic version, and stressed the continuities of the Baldwin Act with its predecessor. However, Aitchison’s glowing celebration of the later act as the “culmination of a long struggle for ‘home rule’ at all levels of government” has ultimately been the more influential point of view.³¹

That “the high water mark” of local autonomy allegedly achieved by the Baldwin Act was not destined to last was given only vague recognition by Aitchison, who traced the beginnings of an “inevitable recession” to the first restrictions on taxing levels in 1866.³² The first scholar to give explicit expression to the idea that local government in Ontario has been “more and more circumscribed” since the mid-nineteenth century was a contemporary of Aitchison’s, political scientist K. Grant Crawford.³³ By tracing incursions into local autonomy back to the advent of administrative boards and tribunals set up in the late nineteenth and early twentieth centuries, especially the Ontario Railway and Municipal Board (later the Ontario Municipal Board). Crawford, who assumed that previous lack of such controls betokened

²⁹ Aitchison, *The Development of Local Government in Upper Canada*, J. W. Aitchison, “The Municipal Corporations Act of 1849,” *Canadian Historical Review* 30 (1949): 107-22; Michael S. Cross, *A Biography of Robert Baldwin: The Morning-Star of Memory* (Toronto: University of Toronto Press, 2012).

³⁰ For the Benthamite inspiration for this act, see Ian Radforth, “Sydenham and Utilitarian Reform,” in *Colonial Leviathan: State Formation in Mid-Nineteenth Century Canada*, ed. Allan Greer and Ian Radforth (Toronto: University of Toronto Press, 1992), 64-102.

³¹ Aitchison, “The Municipal Corporations Act of 1849,” 122.

³² Ibid.

³³ K. Grant Crawford, *Canadian Municipal Government* (Toronto: University of Toronto Press, 1954).

independence, did much to reinforce the notion that the Baldwin Act had indeed created independent local governments. Crawford's work provides much of the basis for the most forceful statement of this position, the article of urban historian John H. Taylor referred to above, the title of which, "The Evolution and Decline of Urban Autonomy in Canada," foretells his characterization of the history of local power vis à vis the province as a linear model of progress and regress.³⁴

Whereas Crawford's argument is essentially negative—autonomy is demonstrated by absence of restriction—Taylor added a positive strand by emphasizing the many powers delegated to municipalities by the Baldwin Act, after the passage of which "urban centres were left free....to pursue their policies of growth and physical and social amelioration."³⁵ Like Crawford, Taylor argues that modern (i.e. late twentieth century) urban governments have little independence, but his conclusion that there has been a linear decline beginning with, and in consequence of, administrative tribunal oversight is less than convincing, due to a flawed methodology. Counting the mandatory (what he calls the 'must' clauses) and comparing them to the permissive ('may') clauses, Taylor infers that because many more of the provisions of the Baldwin Act were permissive than mandatory, the Act was necessarily designed to be and in fact was conducive to local autonomy.³⁶ Taylor's belief that there were no other 'encroachments' by the legislature on local government's decisional turf, on the basis that there were no acts on such major matters as public welfare, ignores the legal-historical context. The common law is, after the fashion of non-legal historians used to an administratively and legislatively ordered society in

³⁴ John H. Taylor, "Urban Autonomy in Canada."

³⁵ Ibid, 272.

³⁶ Ibid. The impact of an act—its interpretation by courts, auditors, politicians, officials, lawyers and citizens—can never be predicted by the text alone. See Gunther Teubner, *Law as an Autopoietic System* (Oxford, UK; Cambridge, Mass., USA: Blackwell Publishers, 1993).

matters of governance, simply ignored, as is the role of courts in construing and applying the ‘may’ and ‘must’ clauses. Nor is there any consideration of the numerous statutes, private and public, that also trenched on powers and proscribed duties to municipal corporations and their officers, or any attempt at analysing the relative significance of the may and must clauses. As American legal historian Lawrence Friedman observed of nineteenth-century municipal acts in the U.S., inclusion of a “miscellany of mismatched powers,” may have been mere persiflage.³⁷ Additionally, and ironically, it may be noted that Taylor’s contention that the act was designed to give the local governments all the authority they might wish is contradicted by none other than the author himself in an article on fire, health and water in nineteenth century Ottawa, wherein he attributes many of the community’s difficulties in providing services to the lack of enabling legislation.³⁸

Though marred by reliance on secondary sources, a greater sensitivity to the law and legal context is apparent in the overview of the history of local governance in Canada by political scientist Warren Magnusson that serves as the introduction to *City Government in Canada*, co-edited by Magnusson with Andrew Sancton.³⁹ In this, and in later works, Magnusson takes the non-romantic view that local liberty has often meant freedom to succour dominant interests, and cautions that the regime established by the Baldwin Act was “not the ideal of direct legitimacy” generally associated with the concept of political autonomy.⁴⁰ He concedes that the principle of

³⁷ Lawrence M. Friedman, *The History of American Law*, 3rd ed. (New York: Simon & Schuster, 2005), 529.

³⁸ John H. Taylor, "Introduction: Fire, Disease and Water in the Nineteenth Century City," *Urban History Review/Revue d'Histoire Urbaine* 8, no. 1 (1979): 7-38.

³⁹ Warren Magnusson, "Introduction: The Development of Canadian Urban Government," in *City Politics in Canada*, ed. Warren Magnusson and Andrew Sancton (Toronto: University of Toronto Press, 1983), 3-42. This is Magnusson’s most explicitly historical treatment of municipal autonomy, but these ideas are foundational and pervasive throughout his later work; Warren Magnusson, "The Local State in Canada: Theoretical Perspectives," *Canadian Public Administration* 28, no. 4 (1985): 575-99, Warren Magnusson and R. Walker, "De-centring the State: Political Theory and Canadian Political Economy," *Studies in Political Economy* 26, no. 1 (1988): 37-71, Warren Magnusson, "Are Municipalities Creatures of the Provinces?" *Journal of Canadian Studies* 39, no. 2 (Spring 2005): 5-30.

⁴⁰ Magnusson, "Introduction: The Development of Canadian Urban Government," 4.

legislative supremacy was fully established and enforced by the English courts through judicial review and the concept of *ultra vires*, whereby the powers given by the legislation were strictly construed so as to deny the locality the benefit of any doubt.⁴¹ However, according to Magnusson, although the court's theoretical role in determining the scope of municipal law was restrictive and anachronistic, this was disregarded in practice, and in actuality "local councils were protected from unwanted burdens" until "the close administrative control" of the twentieth century.⁴² In any event, he contends, the province and municipalities had similar goals (economic growth) and abhorrences (social welfare spending). 'Boosters' clashed with 'cutters' as bonuses to industry depleted budgets and ratepayers protested. The restrictive property franchise exacerbated conservative tendencies. Limitations on autonomy, then, there were, but these are depicted as economic and ideological, rather than legal and structural.

Despite the agreement of Crawford, Aitchison, Taylor, and Magnusson on the perception of local autonomy following the passage of the Baldwin Act, consensus is replaced by confusion when it comes to assessing the Ontario experience in an internationally comparative perspective. Crawford saw the attenuation of local autonomy by administrative tribunals as following an earlier trend in the United States, but does not advert to the 'home rule' movement which seemingly reversed the trend away from local autonomy in many American cities at the same time it was seemingly under attack here. American urban historian Jon C. Teaforde altered his initial ideas on central-local relations when he investigated the contextual reality behind the surface of the legislative record.⁴³ Originally convinced that the constraints on localities apparent

⁴¹ *Ultra vires* (beyond the powers) is a central concept in the Anglo-American jurisprudence of administrative and constitutional law, known as judicial review: see *inter alia* the definition at <https://thelawdictionary.org/ultra-vires/>.

⁴² Magnusson, "Introduction: The Development of Canadian Urban Government," 4.

⁴³ Jon C. Teaforde, *The Municipal Revolution in America: Origins of Modern Urban Government, 1650-1825* (Chicago: University of Chicago Press, 1975), 152; Jon C. Teaforde, *City and Suburb: the Political Fragmentation of Metropolitan America, 1850-1970* (Baltimore: Johns Hopkins University Press, 1979), 231; Jon C. Teaforde, "Special Legislation and the Cities, 1865-1900," *The American Journal of Legal History* 23 (1979): 189; Jon C. Teaforde,

in state law and constitutions hobbled local councils, Teaford subsequently relied on an examination of numerous private or “special” acts to contend that councils were effectively able to commandeer the state legislatures to create exceptions by means of their influence with local delegates to state congresses.⁴⁴ Stelter and Artibise, uncritically comparing Taylor’s less substantiated findings with those of Teaford, submit that local autonomy was indeed stronger in the United States. Magnusson, on the other hand, asserts (without the benefit of empirical research and without providing the basis for his conclusion) that “Canadian municipalities had a narrower range of functions than [those in] the United States but are believed to have had more essential municipal power.”⁴⁵ Even with regard to the present, or at least the less remote past, the comparative situation is far from clear: writing in the 1980s, political geographer Gordon Clark used Ontario as an example of a jurisdiction which has traditionally allowed its municipalities almost no autonomy, citing the extensive powers of the Ontario Municipal Board, but to date no one has done a comprehensive empirical study to determine whether, or how often, these have been used to thwart municipal policy.

This depiction of mid-nineteenth century local autonomy has been accepted by social historians and political scientists even as they turn up inconsistencies. S.J.R. Noel subscribes to the view that provincial control over localities in the period under review was weak and intermittent, but places the terminal limit on local independence much earlier than did Crawford and Taylor, citing the administrative revolution of the Mowat regime, commencing with the

"State Administrative Agencies and the Cities, 1890-1920," *The American Journal of Legal History* 25 (1981): 225-48; Jon C. Teaford, *The Unheralded Triumph, City Government in America, 1870-1900* (Baltimore: Johns Hopkins University Press, 1984); Jon C. Teaford, "New Life for an Old Subject: Investigating the Structure of Urban Rule," *American Quarterly* 37, no. 3 (1985): 346-56; Nancy Burns and Gerald Gamm, "Creatures of the State: State Politics and Local Government, 1871-1921," *Urban Affairs Review* 33, no. 1 (1997): 59-96.

⁴⁴ Teaford, "Special Legislation and the Cities, 1865-1900," 189. For an investigation of this phenomenon in Britain, see John M. Prest, *Liberty and Locality: Parliament, Permissive Legislation, and Ratepayers' Democracies in the Nineteenth Century* (Oxford: Clarendon Press).

⁴⁵ Magnusson, "Introduction: The Development of Canadian Urban Government," 3-42.

Municipal Loan Act of 1873, as trenching considerably on local freedom of action.⁴⁶ Premier Oliver Mowat, writes Noel, “projected the powers of the Ontario Government directly and finally into the local constitution on a scale previously unknown ... [through] provincially appointed councils, agents and trustees...many replacing municipal offices.”⁴⁷ Leo A. Johnson, on the other hand, projects a certain ambivalence toward the issue: he says on one page of his *History of the County of Ontario, 1615-1875* that “the only check on municipal legislation was the judicial test...within the areas given they [municipal councils] were supreme” but on another, that by the passage of the Education Act of 1871 “...the autonomy won by the rural society in the Baldwin Acts of 1849-50 was *again* [my emphasis] eroded in a significant way.”⁴⁸

Historians of education, one of the better studied aspects of mid-nineteenth century Ontario, have come to question the latter assertion, although they have not related their findings to the larger municipal picture. The currently accepted position as advanced by R.D. Gidney and various co-authors is that local communities had considerable clout in stymieing the centralizing zeal of Egerton Ryerson.⁴⁹ Much of this work, especially Bruce Curtis’s explication of the development of the educational inspectorate as a part of these struggles, is sophisticated and helpful, but the issue of local autonomy, even in the narrower sphere of education, remains in doubt.⁵⁰ Given the focus of these studies on the centre, the effect on the localities is unclear. It

⁴⁶ S. J. R. Noel, *Patrons, Clients, Brokers: Ontario Society and Politics, 1791-1896* (Toronto: University of Toronto Press, 1990), 329.

⁴⁷ Noel, *Patrons, Clients, Brokers*, 282.

⁴⁸ Leo A. Johnson, *History of the County of Ontario, 1615-1875* (Whitby, Ont.: Corporation of the County of Ontario, 1973), 176, 268.

⁴⁹ R. D. Gidney, "Centralization and Education: The Origins of an Ontario Tradition," *Journal of Canadian Studies* 7 (1972): 33-47; R. D. Gidney and D. A. Lawr, "Egerton Ryerson and the Origins of Secondary Education in Ontario," *Canadian Historical Review* 60 (1979): 442-65; R. D. Gidney and D. A. Lawr, "Bureaucracy vs. Community? The Origins of Bureaucratic Procedure in the Upper Canadian School System," *Journal of Social History* 13 (1980): 438-57.

⁵⁰ Bruce Curtis, "Preconditions of the Canadian State: Educational Reform and the Construction of a Public in Upper Canada, 1837-1846," *Studies in Political Economy* 10 (1983): 99-121; Bruce Curtis, *Building the Educational State: Canada West, 1836-1871* (Philadelphia, Pa.; London, Ont.: Falmer Press; Althouse Press, 1988); Bruce Curtis, *True*

seems possible that communities could well have had considerable impact, especially of a negative sort, on education policy and in particular on its implementation, without this being indicative of a more general autonomy. Since the education historiography is only peripherally concerned with the question of local government autonomy it is perhaps not surprising that it has not modified the received wisdom on the autonomous nature of the mid-nineteenth century municipal council. However, there are a number of studies much more directly on point that challenge the Shortt/Aitchison/Crawford/Taylor school.

Those whose work tends to undermine the vision of mid-nineteenth century local autonomy have concentrated on the causes of municipal law reform. Earliest of these was political scientist George Anderson, who attributed the development of ‘independent’ local polities to the forces of economic modernization: “...a functional response to the need for greater public investment to support the building of the infrastructure.”⁵¹ Anderson’s thesis was echoed and extended by historical geographer C.F. J. Whebell, who argued that municipal devolution was less a Canadian political achievement than an imperial administrative policy. In two articles, “Robert Baldwin and Decentralization” and “The Upper Canada District Councils Act of 1841 and British Colonial Policy,” Whebell examines the origins of municipal reform, identifying two trends, the decentralized/democratic and the centralized/authoritarian. While colonial policy and ideology clearly favoured the latter, practical considerations, including geography and the legislative calendar, did not. When changes occurred at the imperial level, including parliamentary and municipal reform in Britain, the Colonial Office was prepared to introduce modifications in structure in Upper Canada. Upper Canadian reformers were ambivalent about

Government by Choice Men: Inspection, Education, and State Formation in Canada West (Toronto: University of Toronto Press, 1992).

⁵¹ George Douglas Anderson, "A Comparative Study of Local Government Development in Canada, 1620-1870" (Ph.D. diss., University of Saskatchewan, 1974), 75.

some of these plans, as the earlier District Councils Act seemed to serve their opponents both administratively and by providing opportunities to increase their power through additional patronage in the appointments of district wardens. Eventually in power courtesy of a coalition with Lower Canadian reformers made possible by the 1841 Act of Union, reform leader Robert Baldwin was able to secure the 'democratic' (i.e., elective, though not based on universal manhood suffrage) transformation of the councils. Overall, political decentralization is seen by Whebell as pragmatic and partisan in motivation, though at least partially ideological in form.⁵²

Whebell's interpretation of reform as a 'top-down' imperial project has been given indirect support by Allan Greer and Ian Radforth in the introduction to their co-edited volume on nineteenth-century Canadian state formation, *Colonial Leviathan*.⁵³ However, Greer and Radforth's conjecture that the centre may have been strengthened at the expense of the periphery by the greater legitimacy accorded to the provincial government by the transfer of power (as 'responsibility') must be subject to their dual caution; first, that attention to legal frameworks and institutions is necessary to address these issues, and secondly, that the process of state formation is cultural, and the ways in which central authority became "progressively pervasive in society" should not be assumed to mirror precisely the development of liberal institutions.⁵⁴ Rather, a study of power "that seeks to give recognition to ...the constellation of agencies and officers sharing the sovereign authority"—in which we can undoubtedly include, indeed foreground, municipal councils—demands scrutiny of actual practices and relations.⁵⁵

⁵² C. F. J. Whebell, "Robert Baldwin and Decentralization 1841-9," in *Aspects of Nineteenth Century Ontario*, ed. F. H. Armstrong, 36-47; C. F. J. Whebell, "The Upper Canadian District Councils Act of 1841 and British Colonial Policy," *Journal of Imperial and Commonwealth History* 17, no. 2 (1989): 185-204.

⁵³ Allan Greer and Ian Radforth, "Introduction," in *Colonial Leviathan*, ed. A. Greer and I. Radforth, 3-16.

⁵⁴ *Ibid.*, 8.

⁵⁵ *Ibid.*, 10-11.

Appearing in the same volume of essays on Upper Canada as Whebell's essay, G.P. de T. Glazebrook's survey of the trial-and-error development of democratic municipal institutions in Upper Canada also does not extend to the period after 1849, but in challenging the 'rise of democracy' thesis of Shortt and Aitchison, Glazebrook raises doubts about the eventual independence of the councils which emerged as a result of this process.⁵⁶ Glazebrook takes a jaundiced view of Lord Durham's condemnation of pre-reform government as inefficient, corrupt and wasteful of valuable legislative time, which he feels was probably exaggerated in order to present the strongest case for reform: in fact, he argues, "[t]he one city and nearly all the towns had municipal government not essentially different than modern forms. The provincial government did not manage 'the private business of every parish'" as Durham had claimed.⁵⁷ Eschewing presentist judgmentalism, Glazebrook stresses the demographic and geographic challenges to effective, or indeed any, administration in a struggling province comprised of isolated communities and marginal settlers.

An even more decided assault on the Shortt-Crawford-Aitchison-Taylor thesis has come from the work of Engin Isin.⁵⁸ Though Isin's evidence and logic are occasionally somewhat distorted by his polemical purpose, much of his argument is persuasive.⁵⁹ Isin is more pointed than Whebell and Glazebrook in his thesis that the liberal discourse of self-rule was belied by the reality of central control. Far from being the pinnacle of the struggle for local democracy, the

⁵⁶ G. P. de T. Glazebrook, "The Origins of Local Government," in *Aspects of Nineteenth Century Ontario*, ed. F.H. Armstrong, 36-47.

⁵⁷ Ibid, 46.

⁵⁸ Engin F. Isin, "The Origins of Canadian Municipal Government," in *Canadian Metropolitics: Governing Our Cities*, ed. James Lightbody (Toronto: Copp Clark, 1995), 51-91; Engin R. Isin, "Canadian Federalism and Cities: A Colonial Legacy," in *Political Arrangements: Power and the City*, ed. Henri Lustiger-Thaler (Montreal: Black Rose Books, 1992), 39-68; Engin F. Isin, *Cities Without Citizens: Modernity of the City as a Corporation* (Montréal: Black Rose Books, 1992), 235; Engin F. Isin, *The Birth of the Modern City in British North America: An Introduction* (Toronto: Centre for Urban and Community Studies, University of Toronto, 1989).

⁵⁹ Isin's goal is to promote the city as a primary Canadian political entity, his means historical revisionism.

Baldwin Act is denigrated as embodying a “restrictive, calculating, and centralized mode of municipal government.”⁶⁰ Isin does not go into detail about the characteristics of the act, however, merely noting, like Magnusson, that the restrictive franchise aided the control of local governance by the central elite, and more dubiously, arguing that the corporate form signified the “separation of the city...from its inhabitants.”⁶¹ Again like Magnusson, his major concern seems to be with the lack of constitutional recognition for urban units of governance.⁶² Isin assumes that theory directed reality; he does not explicitly refer to the operation of the legal principle of strict statutory interpretation of (municipal) corporate powers (known as Dillon’s rule to Americans, and increasingly to Canadians) which is what gives legal effect to this arrangement, much less speculate whether this rule was more honoured in the breach, or about the actual brokering of power between the localities, the province, and, most critically, the courts.

As is the case with Whebell and Glazebrook’s articles, none of Isin’s work deals *directly* with local government in to the period after 1849; rather, post-Act ramifications are extrapolated from textual analysis and pre-Act policy. One study that does venture slightly into this period using empirical research also calls the ‘rise of local democracy/municipal autonomy’ thesis into question, albeit tangentially. In his unpublished Ph.D. dissertation “By and for the Large Propertied Interests: The Dynamics of Local Government in Six Upper Canadian Towns During the Era of Commercial Capitalism, 1820-1860,” W. Thomas Matthews takes a Marxist-inflected approach to his subject, painting a picture of the locality as a site of inter-class power struggles,

⁶⁰ Isin, “The Origins of Canadian Municipal Government,” 82.

⁶¹ Isin, *Cities Without Citizens*, 187.

⁶² For the possibility that this principle may not be as sacrosanct in the future as is often assumed, see *Spraytech v. Hudson*, involving a municipal attempt at environmental protection, wherein the Supreme Court of Canada invoked the European concept of ‘subsidiarity’ to expand on municipal initiative: 114957 *Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, 2001 SCC 40.

and local office as a hotly contested prize.⁶³ The pre- and post-Baldwin Act incorporations, he posits, were very much a top-down, capitalist exercise, initiated by the Colonial Office in London and carried out by its appointees in the province. Incorporation of colonial local government was a non-partisan issue, with a widely subscribed goal of economic growth, to be achieved by means of local boosterism, which was both expected and encouraged. But within these parameters, Matthews maintains, the new corporations did not lack for power to carry out their mission: in contrast to the courts of quarter sessions which preceded them, the municipal councils “enjoyed a secure tax base and sweeping legislative prerogatives.”⁶⁴ Like the other historians canvassed here, however, Matthews does not see the law as a problematic or continuing factor in the development of these towns. The elites made choices in directing local activities and were in turn served by these activities. Restrictions and duties play no part in this narrative, and the courts are a negligible factor. In spite of his recognition that “disgruntled” politicians were not above laying formal charges, acknowledgment of conflicts of interest, and the occasional scandal, Matthews sees the press as the only arbiter of political probity and the ballot box as the only check on local power.⁶⁵ A similar conclusion is reached by Andrew Holman in his monograph *A Sense of their Duty: Middle Class Formation in Victorian Ontario Towns*, although his depiction is one of hegemony and consensus rather than conflict.⁶⁶

The most illuminating views of control of the locality by the province in the decades after the passage of the Baldwin Act are to be found in the works of two authors dealing with the development of the administrative state, rather than local government. The earlier of these is

⁶³ W. Thomas Matthews, "By and For the Large Propertied Interests: The Dynamics of Local Government in Six Upper Canadian Towns During the Era of Commercial Capitalism, 1820-1860" (Ph.D. diss., McMaster University, 1985).

⁶⁴ Ibid, 380-81.

⁶⁵ Ibid.

⁶⁶ Andrew Carl Holman, *A Sense of their Duty: Middle-Class Formation in Victorian Ontario Towns* (Montreal: McGill-Queen's University Press, 2000).

Richard Splane's pioneering *Social Welfare in Ontario, 1791-1893: A Study of Public Welfare Administration*.⁶⁷ One of Splane's major themes is the inadequacy of municipally based poor relief, health, and criminal institutions. Yet even in his criticism, he does grudgingly admit that "limited in their resources...the municipalities have never been able to give equal attention to all the functions assigned them."⁶⁸

The province's use of the municipality to fund and administer welfare and other functions of the modern state is given even more explicit expression by J. E. Hodgetts in two studies of the development of Canadian bureaucracy.⁶⁹ A political scientist, Hodgetts' narrative is overtly teleological—centralized, professional bureaucracy is very much seen as the norm and the end—but is instructive for anyone seeking to understand central-local relations in the union and post-confederation periods. Along with providing enabling grants to voluntary organizations, Hodgetts discovers, the government applied coercive legislation to municipalities to further central policies. The system relied heavily on the production of statistical reports, and municipalities provided captive field officers for this purpose, while the provincial secretary maintained "a loose surveillance that involved the collection and collation" of these.⁷⁰ Indeed, the fact that provincial headquarters remained small is attributed "to the heritage of organized governing bodies with their own array of local officials."⁷¹

Left in some doubt is whether this theoretical structure was always operational. If the litany of complaints by the continually frustrated inspector of public institutions chronicled by

⁶⁷ Richard Splane, *Social Welfare in Ontario, 1791-1893: A Study of Public Welfare Administration* (Toronto: University of Toronto Press, 1965).

⁶⁸ *Ibid.*, 284.

⁶⁹ J. E. Hodgetts, *Pioneer Public Service, an Administrative History of the United Canadas, 1841-1867* (Toronto: University of Toronto Press, 1956); J. E. Hodgetts, *From Arm's Length to Hands-on: The Formative Years of Ontario's Public Service, 1867-1940* (Toronto: University of Toronto Press, 1995).

⁷⁰ Hodgetts, *From Arm's Length to Hands-On*, 8.

⁷¹ *Ibid.*

Hodgetts is any indication, some municipalities resorted to passive resistance in the face of externally imposed requirements. However, there may have been advantages accruing from their importance to the system: because municipalities were not much use if they were penniless due to borrowing for railways and other improvements, Premier Mowat was compelled to provide a distribution of funds. Any idea that the centre was in any position to be very strict in its supervision of these is negated by the fact there was no central auditing of municipalities until 1896.⁷²

Intriguingly, despite the cumulative cogency of these incursions into the narrative of a golden age of local autonomy as the goal and immediate consequence of the Baldwin Act, the latter has remained the received wisdom. Caroline Andrew's 1995 article "Provincial-Municipal relations; Or Hyper-Fractionalized Quasi-Subordination Revisited" ignores an article by Isin challenging the thesis in the same collection, as well as his other contributions to the debate, including his 1992 monograph.⁷³ Although she accepts the Whebell-Glazebrook contention that the colony "set up municipal governments...as a way of increasing public expenditure without increasing the provincial debt" she then somewhat contradictorily switches to Taylor's argument that municipal discretion was not limited until administrative tribunals were implemented at the turn of the twentieth century.

That a focus on the judicial would add to the discussion is evident in several studies by American legal academics, most notably Lawrence Friedman, Gerald Frug, Joan C. Williams, and Hendrik Hartog, as well as work by the British scholar Martin Loughlin, and Canadians Ron

⁷² Unsurprising, given that the province's own accounts were less than systematic: Ibid, 224-25.

⁷³ Caroline Andrew and Michael Goldsmith, "From Local Government to Local Governance—and Beyond?" *International Political Science Review* 19, no. 2 (1998): 101-17; Caroline Andrew, "Provincial-Municipal Relations; or Hyper-Fractionalized Quasi-Subordination Revisited," in *Canadian Metropolitcs: Governing our Cities*, ed. J. Lightbody, 137-59.

Levi and Mariana Valverde.⁷⁴ Friedman contends that the popularity of Judge John F. Dillon's treatises on the law of municipal corporations signifies the economic importance of the issue in the latter part of the nineteenth century, as did the frequency of challenges to municipal action, mostly on the basis of *ultra vires*, by ratepayers and others.⁷⁵ He observes that such cases could have serious consequences: "[o]ne disgruntled landowner who attacked a sewer assessment, might, if he won, shatter a whole scheme of urban sanitation."⁷⁶

Of the other American legal academics to turn their attention to municipal matters, Critical Legal Studies scholar Gerald Frug is perhaps the best known. In two articles, "The City as Legal Concept" and "A Legal History of Cities," Frug traces the conflicts over urban autonomy to the corporate character of the urban polity formed in the middle ages.⁷⁷ Turning to nineteenth-century America, he discovered a "process of working a solution to the status of cities within liberal theory... [which] has to a large part been carried out by the development of doctrine."⁷⁸ Judge Dillon is the villain of Frug's account; Dillon, Frug argues, erred in conceptualizing the city as a public entity that needed to be constrained in order to protect the individual, as opposed to a private corporation that needed to be protected to serve the individual. Dillon's eponymous 'rule' that municipal corporations were the mere 'creatures' of

⁷⁴ Gerald E. Frug, "The City as a Legal Concept," *Harvard Law Review* 93, no. 6 (1980): 1057-1154; Gerald E. Frug, "A Legal History of Cities," in *The Legal Geographies Reader: Law, Power and Space*, ed. Nicholas Blomley, David Delaney and Richard T. Ford (Oxford, U.K. and Malden, Mass.: Blackwell, 2001), 154-76; Joan C. Williams, "The Invention of the Municipal Corporation: a Case Study in Legal Change" *The American University Law Review* 34, no. 2 (1985): 370-438; Joan C. Williams, "The Constitutional Vulnerability of American Local Government: the Politics of City Status in American Law" *Wisconsin Law Review* 1986, no. 1 (1986): 83-153; Martin Loughlin, M. David Gelfand, and Ken Young eds., *Half a Century of Municipal Decline, 1935-1985* (London; Boston: Allen & Unwin, 1985); Loughlin, *Legality and Locality*; Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870* (Chapel Hill: University of North Carolina Press, 1983), 220-39; Levi and Valverde, "Freedom of the City: Cities and the Quest for Governmental Status," 409-59.

⁷⁵ John Forrest Dillon, *Treatise on the Law of Municipal Corporations* (Chicago: J. Cockcroft, 1872). Later editions changed the title slightly.

⁷⁶ Lawrence M. Friedman, *The History of American Law*, revised ed. (New York: Simon & Schuster, 2010), 531.

⁷⁷ Frug, "The City as a Legal Concept," Frug, "A Legal History of Cities," 154-76.

⁷⁸ Frug, "The City as a Legal Concept," 1076.

the state, constituted a (to Frug unnecessary and harmful) legal paradigm for the hobbling of local activism.

In his study of New York City in the eighteenth and nineteenth centuries, Hendrik Hartog acquits Dillon of this responsibility. Dillon's treatise, he suggests, merely gave expression to a new form, created by the judiciary as a group due to a collective distrust of municipal power and urban politicians, especially those of the metropolis, New York City.⁷⁹ Hartog infers a breakdown of shared 'republican values,' which manifested itself in an antagonism between judges and politicians at every level.⁸⁰ The judiciary was sceptical of the ability and probity of urban politicians, and, by imposing constraints attempted to influence public action indirectly by forcing the municipality back to the legislature. Dillon's rule was hence "a way of compelling the legislature to take responsibility for the actions of an errant child....The law would compel the legislature to superintend its charge."⁸¹ Hartog does suggest that this strategy may have been in vain, and that powerful cities like New York might have been able to get what they wanted by lobbying law makers.⁸² Doctrine, he seems to argue, is far from omnipotent, but does have power, if only to hinder and hamper, and in this instance to produce 'partially' autonomous public entities.

Hartog's argument in this respect has been challenged by Joan C. Williams. In one of two articles on the subject, Williams tracks the development of the law of municipal corporations in the United States to the towns of New England.⁸³ While New York courts were still "mired in

⁷⁹ He acknowledges that Dillon's rule was in fact first applied to smaller towns. Hartog, *Public Property and Private Power*, 274.

⁸⁰ Ibid, 261: Judges worked to develop a distinctly judicial ideology, of which the most noteworthy feature was an overt defence of 'vested' property rights against the depredations of public authority.

⁸¹ Ibid, 263.

⁸² As Teaford suggests for a later period.

⁸³ New York City, she asserts, was an anomaly due to its early charter; most of these were unchartered, prompting judges to develop a corporate-like identity for them by a creative use of custom, statutory authority and implied rights to act *pro bono publico*, which she traces to the English use of the parish for centrist-originated impositions of

confusion,” Massachusetts courts, less bound by English precedent, developed a form of public quasi-corporation and presaged Dillon’s rule by several decades. Williams does not deny a class aspect to this vision, but speculates that a greater underlying cause was ideological, concerning “the proper scope of government power when the exercise of such power threatened private property interests.”⁸⁴ This conclusion, she finds, is supported by a close reading of Dillon, as many of the cases he cited dealt with the authority of towns to tax individuals in order to finance railroads and similar projects. Williams’ interpretation is supported by the findings of David Millon, looking at judicial review of private commercial corporations in the United States, which he contends were far from autonomous in the nineteenth century, and William D. Popkin, writing on the history of American statutory interpretation.⁸⁵ The latter contends that the judiciary as a group ceased being deferential and became more aggressive in all aspects of judicial review, just as general enabling legislation for incorporation became the norm in the latter part of the nineteenth century.

All these arguments are marked, and marred somewhat, by American exceptionalism. The judicial ideology Williams identifies she describes as ‘republican,’ even on occasion ‘Jacksonian.’⁸⁶ Yet British legal academic Martin Loughlin comes to much the same conclusion in his discussion of the emergence of the doctrine of *ultra vires* as the pre-eminent principle in the judicial review of municipal action occurring at about the same time in England.⁸⁷ As the cash nexus became more critical, Loughlin finds it was “not surprising that the courts took the view that they should seek to ensure that an appropriate balance was maintained” between public

road and bridge building: Williams, "The Invention of The Municipal Corporation," 369. See also Williams, "The Constitutional Vulnerability of American Local Government," 83.

⁸⁴ Williams, "The Invention of the Municipal Corporation," 436.

⁸⁵ David Millon, "Theories of the Corporation," *Duke Law Journal* 1990, no. 2 (1990): 201-62; William D. Popkin, *Statutes in Court: The History and Theory of Statutory Interpretation* (Durham: Duke University Press, 1999).

⁸⁶ Williams, "The Constitutional Vulnerability of American Local Government," 86.

⁸⁷ Loughlin, *Legality and Locality*.

and private interests, and municipalities were treated as fiduciaries for the growing public purse.⁸⁸ The better question, he submits, should be why parliament did not grant more expansive powers, if the restrictive interpretation caused problems for local governments attempting to benefit the public.⁸⁹ The clearest difference lies in his attitude to this phenomenon. While the American scholars referred to all rue judicial intervention in municipal affairs to a greater or lesser degree, Loughlin seems to condone this juridification. Canadians Mariana Valverde and Ron Levi, on the other hand, enthusiastically adhere to the American perspective. They assume that the Canadian trajectory mirrored that of the States, and that ‘Dillon’s rule,’ accepted by an unthinking Canadian judiciary, is to blame for the current anemic state of local government autonomy in Canada.⁹⁰

Another Canadian, Zack Taylor, the only scholar to have taken a sustained comparative approach to what he agrees is Ontario municipalities’ unfortunate lack of autonomy, is similarly discouraged by this state of affairs, but sees the legislative framework, not the judiciary, as the culprit.⁹¹ Taylor argues that by homogenizing local government, replacing all existing charters and treating all as the same type of legal entity (subject to differences in gradation), the province was able to exert greater control, with the result that the ‘home rule’ movement and the opportunities that empowered American cities’ entrepreneurial creativity did not take root in Ontario’s comparatively non-autonomous municipalities.

⁸⁸ Ibid, 46.

⁸⁹ See also Noel, *Patrons, Clients, Brokers*, 285.

⁹⁰ Taylor, “If Different, Then Why?”

⁹¹ Ibid.

Theory and Terminology

The Oxford English Dictionary Online defines *Autonomy* “of a state, institution, etc.: as “[T]he right of self-government, of making its own laws and administering its own affairs,” but adds a qualifier: “(sometimes limited by the adjs. *local*, *administrative*, when the self-government is only partial; thus English boroughs have a local autonomy, the former British colonies had an administrative autonomy; ‘political autonomy’ is national independence).”⁹² Writers on the subject who base their studies on a twentieth-century perception of the nature of local government as quintessentially ‘popular’ and of its primary function as a provider of services, tend to define autonomy in terms of participation, communication and efficiency, while noting that these qualities may be contradictory. Michael Goldsmith notes that the normative attachment to the ideal of local government is peculiarly Anglo-American, and possibly illusory, but nonetheless important, because “autonomy is at the heart of the very justification of local government.”⁹³ Less tautological is Harold Wolman, who extols the opportunity for experimentation and diversity that decentralization allows, arguing that “[t]he structure of political decision making is not value neutral.”⁹⁴

Those studies which are more analytical and philosophical and as a result more divorced from the contemporary experience lend themselves to definitions that may be more helpful to a historical analysis. These range from the broad—the extent to which local governments’ “presence and activities have independent impacts on anything important”—to the narrow—“the

⁹² “Autonomy,” *Oxford English Dictionary Online*, http://dictionary.oed.com.ezproxy.library.yorku.ca/cgi/entry/50015226?single=1&query_type=word&queryword=autonomy&first=1&max_to_show=10.

⁹³ Mike Goldsmith, “Autonomy and City Limits,” in *Theories of Urban Politics*, ed. David Judge, Gerry Stoker and Harold Wolman (London: Sage, 1995), 229.

⁹⁴ Harold Wolman, “Decentralization: What It Is and Why We Should Care,” in *Decentralization, Local Governments, and Markets: Towards A Post-Welfare Agenda*, ed. Robert J. Bennett (Oxford: Clarendon Press, 1990), 36.

capacity...to act in terms of their interests without fear of having their every decision scrutinized, reviewed and reversed by higher tiers of the state.”⁹⁵ Common denominators are the existence of some choice, either in what to do or how to do it, including the choice to make changes, and some degree of fiscal independence, which in combination may be said to distinguish local government from decentralized administration.⁹⁶ That no organization and no person is ever entirely free is a given, but as one observer has commented, present routine may denote (and indeed obscure) past choice.⁹⁷ Hence a perceived current lack of discretion may, paradoxically, be a manifestation of autonomy at some greater level of abstraction.

In addition to definitions, a few theorists have attempted a more precise theoretical deconstruction. Most methodical in this regard has been Gordon L. Clark.⁹⁸ Borrowing from Bentham, Clark identifies two major elements of governmental autonomy, namely *initiative* and *immunity*. The power of the latter, to act without supervision or veto, he argues, though important, is less so than the power to initiate, including the power to regulate. From these, Clark constructs a four-fold typology ranging from local government with both elements of autonomy, which he doubts has ever been approximated except possibly by some medieval city states, to those with neither, mere elected bureaucracies.⁹⁹

Using concepts originated by political scientist W.P.L. Mackenzie, Edward C. Page has written a complex comparison of central-local relations in seven European countries without ever

⁹⁵ Harold Wolman and Michael Goldsmith “Local Autonomy as a Meaningful Analytic Context: Comparing Local Government in the United States and the United Kingdom,” *Urban Affairs Quarterly* (1990): 3-27, 26, Gordon L. Clark, “A Theory of Local Autonomy,” *Annals of the Association of American Geographers* 74 (1984): 195-208, 196; Gordon L. Clark, *Judges and the Cities: Interpreting Local Autonomy* (Chicago: University of Chicago Press, 1985).

⁹⁶ John David Stewart, *Local Government: The Conditions of Local Choice* (London; Boston: Allen & Unwin, 1983).

⁹⁷ Stewart, *Local Government*, 7.

⁹⁸ Clark, “A Theory of Local Autonomy,” 195.

⁹⁹ Ibid.

adverting to autonomy.¹⁰⁰ In its place, he offers related concepts of ‘localism’ and ‘centralism,’ each measured on a ‘legal’ and a ‘political’ scale. In the ‘legal scale,’ Page includes both initiative and immunity, though not in these terms, and further details the various signifiers of these, including mandatory duties (and their relative costs), court supervision, the range of powers and functions performed, central control by administrative procedures and routines and, most important to his mind, “the degree to which the local political elite can raise revenue locally” or depends on central grants.¹⁰¹ At one end of the scale are cases of ‘legal localism,’ wherein central supervision is performed “by remote control”—primarily through legislation and court supervision—and at the other, ‘legal centralism,’ marked by bureaucratic procedures whereby it is ‘hard to undertake major action without involvement by the centre at an early stage.’¹⁰²

The political scale refers to the “influence that local political elites have in national decision-making arenas so far as these affect the locality.”¹⁰³ Political localism can function through municipal associations acting as pressure groups, party politics, or private, direct brokering. Page points out that the political scale requires careful scrutiny: the apparent dependence of a local government on central subsidies, which many observers take as a sign of central control, may in fact signify the reverse, a successful exercise of local political power.¹⁰⁴ He finds localism is strongest where executive power is most concentrated, and conversely, a link between legal localism and powerful local professional bureaucracies. Further, he hypothesizes that political localism is an “inherently defensive and conservative influence in the

¹⁰⁰ Edward Page, *Localism and Centralism in Europe: The Political and Legal Bases of Local Self-Government* (Oxford: Oxford University Press, 1991).

¹⁰¹ Ibid.

¹⁰² Ibid, 40.

¹⁰³ Ibid, 42.

¹⁰⁴ Ibid, 34.

political system” and ultimately that “local political elites have little to gain from greater legal localism, and might even suffer from the greater demands on their time and skills that legal localism might bring.”¹⁰⁵

The applicability of these models to the historiography canvassed above is clear. However, there are clearly elements missing in both. Neither makes allowance for the controls that may be exerted by courts or boards on the initiative of another legal actor through the application of the general law and doctrines other than *ultra vires*. And because they are independent functionaries, it is difficult to see judges as ‘higher tiers of the state’ in Clark’s sense.¹⁰⁶ Partly, the disregard of the legal system as a collateral and perhaps competitive facet of government may be a function of the fundamentally a-historical nature of these theories. What might constitute remote control during the twentieth century in Page’s estimation might well represent the greatest possible control under nineteenth-century conditions. As Foucault argues with regard to power, autonomy should not be seen as static and absolute, but dynamic and variable with time and place.¹⁰⁷ Autonomy, indeed, can be seen as the mirror or obverse of power. Both are often defined in terms of an ‘other,’ power being the positive ‘power over’ the other, and autonomy the negative, ‘freedom from’ the other.¹⁰⁸ The idea of resistance, which is often seen as central to power, is also often seen as central to local government autonomy, especially by those who work within the European historical context, and trace the concept of

¹⁰⁵ Ibid, 67.

¹⁰⁶ Clark, *Judges and the Cities*, 6. This is not to imply that judges are not state actors.

¹⁰⁷ See Alan D. Schrift, “Reconfiguring the Subject: Foucault’s Analytics of Power,” in *Reconstructing Foucault: Essays in the Wake of the 80s*, ed. Ricardo Miguel-Alfonso and Silvia Caporale-Bizzini (Amsterdam: Rodopi, 1994), 185-99.

¹⁰⁸ Niklas Luhmann, Tom Burns, and Gianfranco Poggi, *Trust and Power: Two Works* (Chichester: Toronto: Wiley, 1989); Luhmann writes: “And it is in precisely this that the function of power lies: it secures possible chains of effect independent of the will of the participant who is subjected to power—whether he so wishes or not. The causality of power lies in neutralizing the will, not necessarily in breaking the will of the inferior.” (114).

local autonomy to the medieval city state.¹⁰⁹ Concepts of power and resistance converge in creative, enabling power, the ‘power to.’¹¹⁰

All formulations of autonomy have, as political scientist Jennifer Nedelsky first pointed out in her landmark article “Reconceiving Autonomy,” a de-contextualized, liberal-rationalist, ‘masculinist’ quality.¹¹¹ This is problematic for the consideration of the autonomy of the female self, which concerned Nedelsky, but also, I would argue, for the consideration of the autonomy of institutions and government units. Nedelsky and other feminist scholars have dealt with the shortcomings of liberal theory in two ways, first by developing a notion of ‘relational autonomy’ and secondly by the concept of feminist agency. Both are also appropriate for theorization of institutional or governmental autonomy, particularly in the case of municipal corporations that fit neither the notion of government as a unit of sovereignty, nor either of the standard contemporary models—private and public—of the corporation, itself a “legal hybrid.”¹¹²

Both the concepts of ‘relational autonomy’ and ‘agency’ entail the avoidance of the assumptions that there is a pre-social, non-contextual, atomistic ‘individual,’ and the hierarchical, bifurcated model of the self and the other.¹¹³ No woman is an island, these scholars contend, alone within her patriarchal society or family unit. Similarly, it can be argued that the

¹⁰⁹ Frug, "The City as a Legal Concept", 1057-1154; Frug, "A Legal History of Cities," 154-176; Williams, "The Invention of the Municipal Corporation: A Case Study in Legal Change" 369; Isin, *Cities Without Citizens*, 235.

¹¹⁰ See for example Alan D. Schrift, *Reconfiguring the Subject: Foucault's Analytics of Power*, 147 and Angus Stewart, *Theories of Power and Domination: The Politics of Empowerment in Late Modernity* (London; Thousand Oaks, Calif.: Sage, 2001), especially chapters 1 and 2.

¹¹¹ Jennifer Nedelsky, "Reconceiving Autonomy: Sources, Thoughts and Possibilities," *Yale Journal of Law and Feminism* 1, no. 1 (1989): 7-36.

¹¹² On the corporation as hybrid, see David A. Westbrook, *Between Citizen and State: An Introduction to the Corporation* (Boulder: Paradigm Publishers, 2007), 223.

¹¹³ See generally Catriona Mackenzie and Natalie Stoljar, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (New York: Oxford University Press, 2000), Kathryn Abrams, "From Autonomy to Agency: Feminist Perspectives on Self-Direction," *William and Mary Law Review* 40, no. 3 (1999): 805-46; Kathryn Abrams, "Sex Wars Redux: Agency and Coercion in Feminist Legal Theory," *Columbia Law Review* 95, no. 2 (1995): 304-76, Susan D. Carle, "Theorizing Agency," *American University Law Review* 55 no. 2 (2005): 307-93.

relationship of a municipality with the centre cannot be seen in isolation from the relationships of municipalities with each other and the relationships of the others with the province. Competition among as well as solidarity with other units may complicate the autonomy of any one. In post-Baldwin Act Canada West/Ontario, municipalities existed and continue to exist as part of a network or ‘family’ of local governments and other institutions of law. In their use of creative, facilitative ‘power to’ we see the municipal counterpart of feminist agency.

Another lesson feminist theory provides for the student of local government autonomy is that *apparent* choice may not be indicative of freedom. Choices—powers in the language of municipal law—may be themselves limited by their very categorization, and by extra-legal economic, political or ideological constraints. There may be a pre-determined menu of the possible. On the other hand, the belief that a local government had power and freedom to exercise it may be misleading if its members and their constituents had no interest in, or even idea of, doing so.¹¹⁴ Not only the system and operation of the law, then, but the entire legal environment of local government must be considered as part of an evaluation of the autonomy experienced and agency engaged in by mid-Victorian Ontario municipal corporations.¹¹⁵

By legal environment I do not mean legal culture alone.¹¹⁶ The latter term has been variously defined as “the ideas, attitudes, values, and opinions about law held by people in a society...as network...which determined when and why and where people turn to law or turn away,” and as “the matrix of values, attitudes and assumptions that have shaped both the

¹¹⁴ As John Garrard, a political scientist who has studied local government in nineteenth century Britain, notes, “one must always inquire how far those holding office actually possess the ability to achieve intended effects”: John Garrard, “Social History, Political History and Political Science: The Study of Power,” *Journal of Social History* 16, no. 3(1983): 105-121, 113.

¹¹⁵ David Nelken, "Using the Concept of Legal Culture," *Australian Journal of Legal Philosophy* 29 (2004): 1-26; David Nelken, "Disclosing/invoking Legal Culture: an Introduction," *Social & Legal Studies* 4, no. 4 (1995): 435-52.

¹¹⁶ G. Blaine Baker, "The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire," *Law & History Review* 3, no. 2 (1985): 219-92.

operations and the perception of law.”¹¹⁷ A related notion is that of the ‘shadow of the law,’ the perception of law as a factor in the behaviour and thought of non-lawyers that may or may not be legally “correct.”¹¹⁸ Legal environment includes these, together with law in books—statutes, case law and manuals—and law in action ‘from above’ and ‘from below.’¹¹⁹ The idea of legal environment seeks to avoid the dichotomy of lawyer’s and non-lawyer’s law at the heart of many of these concepts. By legal environment I have in mind a holistic notion of law in books, in action, in custom and in shadow, law from above and below.

My definition of the ‘law of municipal institutions,’ as it was known to mid-nineteenth century Ontarians, and now more commonly referred to as ‘municipal law,’ is a correspondingly broad one. A municipality is both public—a government—and private, a corporate entity, albeit (and somewhat confusingly) now known to the law as a ‘public’ corporation, a distinction which was embryonic at the time.¹²⁰ It is a ‘fictitious’ creation of statute, but is also the embodiment of real ratepayers and residents, whose political lobbying in the period before the comprehensive incorporating and enabling provisions of the Baldwin Act, and whose physical presence thereafter was a pre-condition of this legal status. Absent statutory immunity, a corporation is subject to the common law of tort, contract, and agency, as well as the law of corporations in

¹¹⁷ Lawrence M. Friedman, *Total Justice* (New York: Russell Sage Foundation, 1985), 30-31; Kermit Hall, *The Magic Mirror: Law in American History* (New York: Oxford University Press, 1989), 6.

¹¹⁸ The “shadow of the law” was the title of a legal history of divorce law by James G. Snell. James G. Snell, *In the Shadow of the Law: Divorce in Canada, 1900-1939* (Toronto: University of Toronto Press, 1991). Snell appears to use the term to mean the absence of law: I prefer the concept as advanced originally by legal sociologists Ruth M. Mnookin and Lewis Kornhauser, “Bargaining in the Shadow of the Law: the Case of Divorce,” *Yale Law Journal* vol. 88, (1979): 917-72 and elaborated on by Marc Galanter, “Justice in Many Rooms: Courts, Private Ordering and Indigenous Law,” *Journal of Legal Pluralism* 19 (1981): 1-47.

¹¹⁹ Roscoe Pound, “Law in Books and Law in Action,” *American Law Review* 12 (1910): 12-36; William Forbath, Hendrik Hartog, and Martha Minow, “Introduction: Legal Histories From Below” *Wisconsin Law Review* 1985, no. 4 (1985): 759-66; Peter Karsten, *Between Law and Custom: High and Low Legal Cultures in the Lands of the British Diaspora- the United States, Canada, Australia, and New Zealand, 1600-1900* (Cambridge, UK; New York: Cambridge University Press, 2002).

¹²⁰ Alan Wolfe, “The Modern Corporation: Private Agent or Public Actor?” *Washington and Lee Law Review* 50, no. 4 (1993): 1673-96; David Millon, “Redefining Corporate Law,” *Indiana Law Review* 24, no. 2 (1991): 223-77; Millon, “Theories of the Corporation,” 201.

general, and other statutes. As a quasi-legislative body, it may enact its own by-laws; as an administrative body it may enforce them. It may enter into contracts, sue and be sued, but its ability to do so—along with its other actions—may be subject to judicial review. All these aspects were included under the rubric of ‘municipal law’ by the lawyers who indexed statutes and case reports and by the writers and publishers who wrote the manuals and periodicals marketed to municipal institutions and their personnel in the period under review, and are consequently considered as (partly) constituting the municipal legal environment.

Needless to say, it would be impossible to study these sources in their entirety or to produce a definitive statement of the law of municipal institutions in mid-Victorian Ontario, even if the latter were a worthwhile goal. Rather, I speculate on aspects of the ecology of central-local relations (and local-local relations) during these thirty years with reference to the concepts of initiative and immunity, localism and centralism on the political and legal scales, and institutional agency. By the use of the terms ‘ecology’ and ‘environment’ I do not wish to imply that the various elements of municipal law necessarily worked together coherently or purposefully. Nevertheless, I contend that local government was part of an interconnected legal system of ‘low’ governance and public administration, and its autonomy and agency must be understood in that context.

I use the terms ‘low government/low governance’ to denote non-sovereign elected local governments, as well as the related terms ‘low legislature/legislation.’ I have analogized these from the now well established legal-historiographic concept of ‘low law.’ This concept originally described the peculiar status of justices of the peace of early modern England, who were at once the most inferior and powerless members of the judicial hierarchy, but paradoxically appeared among the most independent; it has been extended to include the administrative and executive

roles of JPs in Quarter Sessions, and to other ‘low’ officials of the state.¹²¹ In each case, it is central to the concept that while these functionaries were theoretically subordinate, they exhibited an independence resulting from their very ubiquity, resulting in a lack of visibility within the system and the condonation of their (occasionally rogue) actions by their ‘high law’ superiors. In this dissertation, I speculate whether the same can be said of municipal corporations in Canada West/Ontario after the Baldwin Act disaggregated low governance from low law.

Outline and Methodology

Municipal legislation extended far beyond the Municipal Act of 1849. The 1859 Municipal Manual of Robert A. Harrison listed some 316 acts or excerpts of acts as relevant to municipalities, as well as private acts relating to specific corporations.¹²² Still, it was the Baldwin Act and its three consolidations during this period that were clearly the foundation of the municipal law; indeed, I argue that they functioned as a ‘low constitution’ for the province. In Chapter 2, I take these statutes and collateral legislation seriously, taking a closer look at the ‘may’ and ‘must’ clauses to consider questions of power, responsibility and liability.

Case law relating to municipalities was similarly abundant. According to R.C.B. Risk, ‘municipal law’ cases made up the fifth largest category of reported cases in the jurisdiction in

¹²¹ See especially Douglas Hay, "Dread of the Crown Office: the English Magistracy and King's Bench, 1740-1800," *Law, Crime and English Society 1660-1840*, ed. Norma Landau (Cambridge, UK: Cambridge University Press, 2002), 19-45; Douglas Hay, "Legislation, Magistrates and Judges: High Law and Low Law in England and the Empire," in *The British and Their Laws in the Eighteenth Century*, ed. David Lemmings (Woodbridge, UK: The Boydell Press, 2005), 59-79; Paul Craven, *Petty Justice: Low Law and the Sessions System in Charlotte County, New Brunswick, 1785-1867* (Toronto: The Osgoode Society for Canadian Legal History and University of Toronto Press, 2014), especially Chapter 1 "High Law, Low Law, Not Law"; Bradley J. Miller, *Borderline Crimes: Fugitive Criminals and the Challenge of the Border, 1819-1914* (Toronto: The Osgoode Society for Canadian Legal History and University of Toronto Press, 2016), 50-3. Peter Karsten uses the terminology somewhat differently, to refer to non-official law or custom: Karsten, *Between Law and Culture*.

¹²² Robert A. Harrison, *The New Municipal Manual for Upper Canada: Containing Notes of Decided Cases and a Full Analytical Index* (Toronto: Maclear, 1859).

the union period.¹²³ Chapter 3 concerns the indirect supervision of local governments by judges and juries. I look beyond the ‘municipal’ classification to all reported cases from 1850 to 1880 that named a municipal corporation as a party. These include cases of statutory interpretation and judicial review, tort, contract, agency, trust, crime, arbitration, expropriation, drainage, and the general law of corporations. I focus on reported cases relating to mandamus, as indicative of judicially enforced legal duties, the judicial quashing of by-laws, as evidence of restriction on local government action, and civil cases of negligence and nuisance whereby judges and juries could impose damages for liability on local governments.¹²⁴

This ‘high’ law of legislation and reported cases from superior courts was the basis, but not the entirety of the legal environment of mid-Victorian municipal corporations. In Chapter 4 I explore the ways these sources of law were filtered and communicated to local governments. I examine in particular numerous private commercial publications in the form of municipal manuals, municipal case reports and journals, and consider the messages concerning their legal status likely to have been received by municipal councils and their personnel.¹²⁵

¹²³ R. C. B. Risk, "The Law and the Economy in Mid-Nineteenth-Century Ontario, A Perspective," in *Essays in the History of Canadian Law, vol.1*, ed. David H. Flaherty (Toronto: The Osgoode Society, 1981), 88-131.

¹²⁴ LexisNexis Quicklaw purports to include all Ontario reported cases in its online database.

¹²⁵ Robert A. Harrison, *The New Municipal Manual for Upper Canada* (Toronto: MacLear, 1859); Robert A. Harrison, Henry O'Brien, *The Municipal Manual for Upper Canada*, 2nd ed. (Toronto: W.C. Chewett, 1867); Robert A. Harrison, *The Municipal Manual: Containing the Municipal and Assessment Acts, and Rules of Court for the Trial of Contested Municipal Elections, with Notes of All Decided Cases, some Additional Statutes, and a Full Index*, 3rd ed. (Toronto: Copp, Clark & Co., 1874); Robert A. Harrison and F. J. Joseph, *The Municipal Manual: Containing the Municipal, Assessment, and Liquor License Acts, and the Rules for the Trial of Contested Municipal Elections, with Notes of All Decided Cases Bearing Thereon, and Additional Statutes*, 4th ed. (Toronto: Rowsell & Hutchinson, 1878); Thomas S. Shenston, *The Oxford Gazeteer* (Hamilton, C.W. : Printed and published for the author by A.J. Chatterton, 1852); Hugh Scobie and J. Balfour, *Scobie & Balfour's Municipal Manual for Upper Canada for 1850* (Toronto: Scobie & Balfour, 1850); Hugh Scobie, *Scobie's Municipal Manual for Upper Canada*, 2nd ed. with supplement (Toronto: Hugh Scobie, 1851); Hugh Scobie, *Scobie's Municipal Manual for Upper Canada*, 3rd ed. (Toronto: H. Scobie, 1852); Hugh Scobie, *Scobie's Municipal Manual for Upper Canada: Containing, besides the Contents of the Three Previous Editions, the Acts that Have Since Been Passed by the Legislature Of The Province, to the End Of the Year, 1852, In Reference To Municipalities and The Municipal System Established in Upper Canada: With a Copious Index*, 4th ed. (Toronto: H. Scobie, 1853); Hugh Scobie and J. Balfour, *The Municipal Manual for Upper Canada*, 5th ed. (Toronto: Thompson & Co., 1855); Thomas Wills, *A Compilation Of The Acts Respecting The Municipal Institutions of Ontario, A.D. 1870* (Toronto: Hunter, Rose, 1870); R. E. Kingsford, *Collection of such of the Revised Statutes of Ontario and of the Acts Of The Legislature Of*

Chapters 5, 6, 7 and 8 are based primarily on archival records. Because the law-related records of municipal corporations are not subject to client confidentiality, that bugbear of legal historical research, I have been able to examine locally documented and collated evidence of the law as experienced ‘from below,’ or at least from the middle, as I do not aim to include a discussion of the impact of municipal regulation on the citizenry in this study. Various aspects of law-related behaviour by legal and non-legal actors—the corporations, their officers, councillors, solicitors, auditors, and contractual partners, claimants and ratepayers—can be recovered using archival material recognizable as belonging in what Robert Gordon famously called the “boxful of distinctive appearing legal things” such as by-laws, contracts, claims, solicitors’ letters, arbitration awards and reports, petitions to and from council, as well as material not so obviously in the “law box” such as budgets, motions, vouchers, committee reports, and correspondence.¹²⁶

Most of the locally generated records I use in these chapters are from the United Counties of Leeds and Grenville Fonds at the Archives of Ontario.¹²⁷ I have chosen to look closely at rural, rather than urban, municipalities, partly on account of relative populousness; the Journals of the Legislative Assembly in 1859 stated the population of Leeds County to be 30,280, about the same as the city of Toronto at the time.¹²⁸ The population of Grenville County was 20,707. Also relevant to this decision is the fact that in an agriculturally-based market economy, the hinterland was the

That Province Passed In The Session 41 Victoria, 1878: as Relate to Municipal Matters, (Toronto: Hunter, Rose & Co., 1878); *The Upper Canada Law Journal* (1855); *The Canada Law Journal* (1868); *Local Courts and Municipal Gazette* (1865).

¹²⁶ Robert W. Gordon, “Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography,” *Law & Society Review* 10 (1955): 9-55.

¹²⁷ Archives of Ontario [hereafter AO], F1740 (formerly Record Group 21), United Counties of Leeds and Grenville fonds includes the official records of Leeds and Grenville County, including Council Minutes, 1850-1915; By-laws, 1859-1904; Clerk Treasurer's Records, 1851-1922.

¹²⁸ Toronto’s population was given as 30,775. Journals of the Legislative Assembly of the Province of Canada, 1859, Appendix A, 27-8.

locus of economic growth; the development of the transportation network that connected it to distribution centres and served its growth was a—if not the—major preoccupation of the legislative assembly.¹²⁹ The successor to the Johnstown District in the (relatively) long-settled southeastern part of the province bordered by the Rideau River, Lake and Canal to the north and the St. Lawrence River to the south, the United Counties of Leeds and Grenville were reasonably prosperous, especially in the area closest to the river, though already beginning what was to be a long economic and demographic decline.¹³⁰ I have not examined the occupational breakdown of the population of the two counties, but if the data respecting the make-up of juries referenced in Chapter 6 is an indication, the local political class was comprised of established farmers, merchants and small businessmen.

Like all counties under the Baldwin Act, the united counties (which maintained separate status for non-municipal purposes such as land registries and elections) were a federated jurisdiction. The municipal council of the combined counties consisted of the reeves and deputy reeves of fifteen townships, three towns, and more than a dozen incorporated villages. The United Townships of the Front of Leeds and Landsdowne and the Rear of Leeds and Landsdowne and the Township of Augusta are the primary junior jurisdictions studied, since their records are the most

¹²⁹ Urban centres in Canada West/Ontario were concentrated on trade and commerce rather than manufacturing. The process of industrialization that would soon diversify and skew this economy was in its infancy, as was the urban labour force that would accompany it. See Douglas McCalla, *Planting the Province: The Economic History of Upper Canada, 1784-1870* (Toronto: University of Toronto Press, 1993), Michael Piva, "Government Finance and the Development of the Canadian State," in *Colonial Leviathan*, ed. A. Greer and I. Radforth, 257-83; Peter A. Baskerville, "Transportation, Social Change and State Formation, Upper Canada 1841-1864," in *Colonial Leviathan*, ed. A. Greer and I. Radforth, 230-56; Andrew Burghardt, "Some Economic Constraints on Land Transportation in Upper Canada/ Canada West" *Urban History Review* 18, no. 3 (1990): 232-36.

¹³⁰ Peter A. Baskerville, *Sites of Power: A Concise History of Ontario* (Don Mills, Ont.: Oxford University Press, 2005), 81. The original colonists in the area were mainly American loyalists, whose conservatism was augmented by Protestant immigrants from the rural north of Ireland. See Donald H. Akenson, *The Irish in Ontario: A Study in Rural History* (Montreal: McGill-Queen's University Press, 1999); Livio De Matteo, "The Wealth of the Irish in Nineteenth-Century Ontario," *Social Science History* 20, no. 2 (1996): 209-34.

complete and comprehensive for this period.¹³¹ Although they cannot be said to be typical, these jurisdictions were not atypical, at least in their interests, which centred on transportation and education.¹³²

Chapter 5 is concerned with the low government of the Municipal Council of the United Counties of Leeds and Grenville in the shadow of high law. I consider the legality, illegality and extra-legality of municipal action and by-laws, reliance by the council on solicitors, clerks and other personnel for legal input, and evidence of the co-option of these mini-bureaucracies by the province, as well as the possible effect on local autonomy of litigation and claims, contracts and arbitrations. Chapter 6 deals with the indirect supervision of municipal councils by other 'low law' components of the system, such as provincial inspectors and grand juries, again with a focus on the United Counties of Leeds and Grenville.¹³³ In Chapter 7 I look at the operation of courts of revision (committees of five councillors to adjudicate appeals from property taxation) in three townships in Leeds and Grenville, namely the Townships of the Front of Leeds and Lansdowne, the Rear of Leeds and Lansdowne, and Augusta, as a case study of local government agency.

¹³¹ AO, F1668, Township of Front of Leeds and Lansdowne fonds, includes Council Minutes, 1851-1960; By-laws, 1862-1960; Assessment and Collectors Rolls, 1853- 1960; Clerk-Treasurer's Records, 1850- 1960; F1889 Township of Rear of Leeds and Lansdowne fonds includes Council Minutes, 1850-1963; By-laws, 1850-1954; F1523 Township of Augusta fonds, includes Council Minutes, 1850-1902; By-laws, 1836- 1902; Assessment and Collectors Rolls, 1851-1917; Clerks Files, 1850-1900; F2021, Township of Wolford fonds includes Minutes and By-laws, 1850-1893; F1672 Town of Gananoque fonds, includes Council Minutes, 1863-1966; By-laws, 1863-1960; Assessment and Collectors Rolls, 1863- 1952; Cash Books, 1856-1960; F 1558, Town of Brockville Fonds including Council Minutes, 1832-1960 (gaps); By-laws, 1854- 1959 (gaps); Assessment and Collectors Rolls, 1895-1959 (gaps); Clerk-Treasurer's Records, 1851-1938.

¹³² See Glenn J. Lockwood, *The Rear of Leeds and Lansdowne: The Making of Community on the Gananoque River Frontier, 1796-1996* (Lyndhurst, Ont.: Corporation of the Township of Rear of Leeds and Lansdowne, 1996) on the dangers of extrapolating social and economic *data* from one township to the province as a whole (viii), but he does not question its political representative-ness. On the importance of transportation and education as local as well as provincial issues, see Baskerville, "Transportation, Social Change and State Formation," 230-56; also Curtis, *Building the Educational State*.

¹³³ A version of this chapter is published as Mary Stokes, "Grand Juries and "Proper Authorities": Low Law, Soft Law, and Local Governance in Canada West/Ontario, 1850-1880," in *Essays in the History of Canadian Law, vol.XI: Quebec and the Canadas*, ed. G. Blaine Baker and Donald Fyson (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2013), 538-70.

Because attempts to alter their legal environment are the best evidence of how the municipal corporations saw their legal environment, what they found undesirable and wanted removed, or what they saw as desirable and wanted included, Chapter 8 is devoted to exploring municipal attempts at political agency by means of petitions to the provincial government in the decade 1867-77, and the place of inter-municipal cooperation and competition in the petitioning process. This chapter is based primarily on the records kept by the provincial secretary held at the Archives of Ontario.¹³⁴

In the concluding chapter I discuss whether and in what ways municipal corporations in Canada West/Ontario in the period 1850-1880 can be described as autonomous; the usefulness of concepts of autonomy and agency to understanding the historical experience of local government; and what the legal dimension of local government in mid-Victorian Ontario can tell us about the interrelationship of local autonomy and local governance.

¹³⁴ An early version of this chapter is published as Mary Stokes, "Petitions to the Legislative Assembly of Ontario from Local Governments, 1867-1877: A Case Study in Legislative Participation," *Law & History Review* 11, no. 1 (1993):145-80.

Chapter 2: A Low Constitution: Municipal Acts and Local Government Autonomy in Canada West/Ontario, 1850-1880

In a 1984 review essay, “Thinking about Statutes: Hurst, Twining, Calabresi and Miers,” Janet Lindgren and John Henry Schlegel decried the tendency of legal academics to pay lip service, but little more, to the centrality of statute law in the common law world: “It is virtually impossible to get a lawyer...to take statutes seriously—that is, to take them on their own terms without immediately running to the cases to see what they really mean.”¹³⁵ The exception proving the rule was American legal historian James Willard Hurst, who spent a long and productive career attempting to rectify the overwhelming and, to his mind, inapt attention paid by his colleagues to judge-made law. According to Hurst, the nineteenth century was the beginning of the era of the statute, when legislatures came to be the predominant lawmakers, and the most significant legal interpreters were as likely to be administrators as judges.¹³⁶

More recently, in the introduction to *Masters, Servants and Magistrates*, two members of a later generation of legal historians, Doug Hay and Paul Craven, wrote that the aim of their project, a comparative study of master and servant statutes over several centuries and continents, is to “take the statutes seriously.”¹³⁷ In so doing, they are careful to disclaim any intimation that this means taking them as descriptive of systemic reality: “Taking the statutes seriously is not to hold them out as mirrors of what masters, servants and magistrates were doing on the ground....

¹³⁵ Janet S. Lindgren and John Henry Schlegel, “Thinking About Statutes: Hurst, Calabresi, Twining and Miers,” *American Bar Foundation Research Journal* 1984, no. 2 (1984): 458-68, 462.

¹³⁶ James Willard Hurst, *The Growth of American Law: The Law Makers* (Boston: Little, Brown, 1965).

¹³⁷ Douglas Hay and Paul Craven, “Introduction,” in *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955*, ed. Douglas Hay and Paul Craven (Chapel Hill: University of North Carolina Press, 2004), 1-58.

[T]he statute law was sometimes ignored, sometimes wilfully misapplied, and often stated in terms so broad as to allow the judges an almost infinite discretion.”¹³⁸

To take statutes seriously is to accept them as a product of politics, and the legislature as a place for the contestation of power and influence. The legislation that results from political compromise, partisan posturing and the vagaries of the drafting process may be toothless, internally contradictory, unrealistic, cynical, incoherent, ignored, or distorted in practice or by interpretation by judges. Nor should law ever be reduced to legal texts. Yet statutes were (and are) nonetheless recognized as *prima facie* legitimate and authoritative by contemporaries, and as such are as worthy of sustained and careful historical inquiry. As Richard Corrigan and Derek Sayer put it, “States...*state*”; in mid- nineteenth century Canada West/Ontario state statements on local government and related subjects took the form of provincial legislation.¹³⁹ In a subsequent chapter, I examine the indirect dissemination of this corpus of statutory law to local government actors through the filter of commercial publications. In this chapter, however, I consider municipal legislation as stated state policy, not as the essence or totality of ‘municipal law’ for this particular time, place, and set of actors, but certainly a key, indeed foundational, element.

Since the aim of this dissertation is to consider the bearing municipal law had on local autonomy, I focus particularly on the questions raised by the literature discussed in Chapter 1. That is, the ‘intent’ of the original drafters aside, does centralized provincial/imperial control of municipal corporations in the service of economic growth appear to have been the guiding principle promoted by the content of the act, as posited by Isin (strong version) and Whebell and

¹³⁸ Ibid, 1-58, 52.

¹³⁹ Richard D. Corrigan and Derek Sayer, *The Great Arch: English State Formation as Cultural Revolution* (Oxford; New York, Blackwell, 1985), 3. Legislation that applied to Canada West/Ontario could be provincial or imperial, and after 1867, federal, but all *municipal* legislation was provincial.

Glazebrook (weaker version)? Or was the legislation a facilitative framework for the devolution and decentralization of power as Aitchison, Crawford, and Taylor et al. contend? Is there indeed a coherent policy to be deduced at all?

Before considering the content of these statutes, it is worth noting that if an important factor in autonomy is absence of intrusion, the legislative record belies any such conclusion. The public statutes in force from time to time from 1850 to 1880 which include the term ‘municipal’ in their title were numerous. No year between 1850 and 1880 went by without some legislative intervention in the sphere of low governance. Seventy acts appear in the indices to the official statutes under this rubric, and many others were identified as pertaining to municipal affairs by the authors of contemporary municipal manuals. Not all, but many, of these acts were lengthy. The original ‘Baldwin Act,’ the Municipal Corporations Act of 1849, appears to have been the most extensive and complex act passed by the legislature of the United Canada to that date and for some years thereafter, running to sixty-eight pages and 429 sections. The three consolidations passed during the period 1850 to 1880 (in 1858, 1866 and 1873) are even longer. Despite evident efforts by drafters of the later versions to reduce repetition and redundancy, the 1873 version runs to 154 pages and 515 sections.

Though they are generally ignored by historians concerned with local government autonomy, other major acts were clearly central to the freedom and powers of municipal councils.¹⁴⁰ Included among these were those dealing with assessment (municipal taxation) and education. The latter system was locally based and organised, administered by elected Boards of Trustees, but mostly funded by taxes raised by municipal councils. Many minor acts which clearly affected municipal law and administration also dotted the sessional indices. These

¹⁴⁰ The recognition of acts relevant to municipal administration varied according to the authors of contemporary municipal manuals, but all agreed on the centrality of assessment and education acts: see Chapter 4.

included so-called private acts that were curative or clarifying in nature; these legalized by-laws and other actions by municipal councils which were suspected to be *ultra vires* or had been so found by a court of record.¹⁴¹ When a council was in trouble because of defects in a by-law or its process, such as insufficient notice, the legislature could usually be counted on for an act to remedy the scheme, especially when the mistake was a technicality resulting in no real harm to anyone, or when it could lead to a breakdown in civic affairs generally, as in the case of an invalid rate-setting by-law.¹⁴² On occasion unforeseen but unassailable social desiderata triggered remedial legislation; for instance the patriotic but technically illegal contributions of municipalities to a fund for assistance of the imperial war effort in the Crimea.¹⁴³ Other amending acts were remedial of the main statute. After every consolidation or major act at least one amending act was passed to fix errors or omissions. For example, in 1850 an act was passed to clarify that the right of townships to licence taverns was subject to British legislation and duties.¹⁴⁴

The frequency of legislating on the subject and the physical dimensions of these acts attest to the importance accorded municipal law in Canada West/Ontario during this period. Given this volume, it would be impossible to chronicle the entirety of the legislation or map all the changes in the space of this chapter. Nor would such an exercise be very helpful to the purpose of this study. It is my contention that too much faith has been put in the Municipal Acts as representing municipal law, but paradoxically too little attention paid to them. As I have argued, simply counting permissive or restrictive provisions—the ‘must’ and ‘may’ clauses—which form the basis of Taylor’s conclusions about local autonomy, is inadequate. A more

¹⁴¹ I discuss the distinction between public and private acts in Chapter 8.

¹⁴² See Chapter 3.

¹⁴³ See Chapter 8.

¹⁴⁴ 13 & 14 Vic. c.65 (1850).

nuanced and legally conscious assessment is required. While I emphasize features connoting power and control, I look beyond the numbers, first looking at the statute as a text, then to the *nature* and *degree* of the expressly granted powers—Taylor’s may clauses—and finally to the explicit restrictions on these, along with clauses setting out duties, liabilities, enforcement provisions—the ‘must’ clauses.

Taking the Municipal Act Seriously

Taking a statute seriously should involve parsing it with consideration to language, structure and the context. There is no preamble to the Municipal Act of 1849, but the first section states that its rationale is “to provide, by one general law, for the erection of Municipal Corporations, and the Establishment of Regulations of Police, in and for the several Counties, Cities, Towns, Townships and Villages in Upper-Canada.”¹⁴⁵ By this statement, and especially the phrase “one general law” the legislature gives implicit notice that by this act it was expressly continuing in the Benthamite footsteps of Lord Sydenham’s District Councils Act of 1841, rejecting the piecemeal, Band-Aid approach of the English *Municipal Corporations Act* of 1835.¹⁴⁶ The latter statute, while setting out a mandatory uniform content for the low legislation of all the jurisdictions covered by its mandate, applied only to (some) urban communities that were already incorporated, and did not set up a general incorporation mechanism or general incorporation scheme. In fact, the English *Municipal Corporations Act, 1835* reads as nothing so much as a codified, compound, multi-jurisdictional by-law.¹⁴⁷ The Baldwin act, in contrast,

¹⁴⁵ 12 Vic. c.81 (1849), s.1.

¹⁴⁶ Radforth, "Sydenham and Utilitarian Reform," 64-102; *The Municipal Corporations Act, 1835*, 5 & 6 Wm. IV., c.76 [U.K], sometimes known as the Municipal Reform Act. See generally, G. B. A. M. Finlayson, "The Politics of Municipal Reform, 1835," *The English Historical Review* 81 no. 321 (October 1966): 673–92.

¹⁴⁷ The Local Governments of English Counties were not standardized by legislation until 1888: *The Local Government Act, 1888*, 51 & 52 Vic. c.41 (UK). On the movement in nineteenth century drafting from the ad hoc to the planned, see Roderick A. MacDonald "The Fridge Door Statute," *McGill Law Journal* 47 (2001): 11-38.

tended to eschew detailed prescriptive content, except in the case of unincorporated police villages, discussed below. It plunges directly into the parameters for each level of municipality, omitting formal preliminaries of definition and interpretation provisions. A rudimentary interpretation section, dealing with issues of gender and number, appears near the end of the act; later municipal consolidations included more sophisticated definition clauses where modern readers would expect to see them, at the beginning of the statute. The names and boundaries of all municipal corporations, and unions of townships and counties, were set out in schedules to the act (a major omission from which resulted in the first of the many amendments to the act.¹⁴⁸)

Counties, though given pride of place in the preamble, are not the first unit to be set out in the statute; Part I deals with the township, which previously had been a unit of administration and land surveying and registration rather than governance.¹⁴⁹ The township was made the default unit—every (settled) part of the province not part of an incorporated village, town or city (or Indian reserve) was to be part of a township.¹⁵⁰ Where numbers were scarce, townships were united, but clearly the government was attempting to avoid the large units of the District Councils Act which had made governance difficult, if not untenable.¹⁵¹

Consequently, all rural settlers were residents of townships, and also of the counties in which these were located. Set out in Part II of the act, counties had no direct electoral or fiscal

¹⁴⁸ 13 & 14 Vic. c.64 (1850).

¹⁴⁹ Township meetings were allowed for the limited purposes of electing township officials.

¹⁵⁰ First Nations' reserves are not specifically excluded by the act, but are not included in the schedules setting out the various incorporations. For a chronology of the pre-confederation 'Indian' acts, see John F. Leslie, "The Indian Act: An Historical Perspective," *Canadian Parliamentary Review* (summer 2002): 23-27, 24. Leslie writes that by the *Act to Protect Crown Lands from Injury and Trespass*, 2 Vic. c.15 (1839), Indian lands were to be counted as Crown lands (and hence expressly not available for settlement). In 1850, by *An Act for the Protection of Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury* (13 & 14 Vic. c.74), Indian lands were further exempted from the general system. The act required Crown approval for any dealing with Indian Lands, and gave explicit exemption to Indians from taxation, judgment and seizure and prohibited the sale of liquor to Indians. See also John S. Milloy, "The Early Indian Acts: Developmental Strategy and Constitutional Change" in *As Long as the Sun Shines and the Water Flows: A Reader in Canadian Native Studies*, ed. Ian A. L. Getty and Antoine S. Lussier (Vancouver: UBC Press, 1983), 56-64.

¹⁵¹ Aitchison, "The Development of Local Government in Upper Canada," 38 ff.

base. They were mini-federations, composed of the representatives (reeves and deputy reeves) of the sub-units within their borders (except for the three cities, which although each part of a county for judicial and administrative purposes, were independent of the county councils).¹⁵² Parts III, IV, V, and VI dealt with Police Villages (unincorporated ‘urban’ entities for which an administrative structure and by-laws were provided, but no democratic apparatus was conferred), Incorporated Villages, Towns, and Cities, respectively. Part VII, ‘Miscellaneous,’ is appropriately named but particularly illuminating in assessing the overall character of the legislation; I return to the consideration of this part below. Rules specific to each level were included in each part. The powers of the urban corporations (incorporated villages, towns, and cities) were cumulative; that is, the powers of the larger units included and augmented the powers of the smaller. Later acts would be cumulative by design for all levels; that is, the first level (the township in all cases) provided the template, and the rules for other levels added to or subtracted from those assigned to the township. Thus the initial grant of corporate powers in the later consolidations is repeated for each gradation only implicitly.

Although the term ‘power’ is always used to define Anglo-American corporations, it is somewhat of a misnomer, being a designator of legal status rather than a distinction within the classification; consequently, it is not appropriate to include the general corporate powers clauses among the ‘may’ clauses. The recognition that a specified group of people may act as a legally competent, ever-living ‘person’ through the medium of a corporate name and seal, with ‘powers’ to sue and be sued, to enter into contracts, and to buy, sell, and deal with property, is definitional, the essence of a corporation, but though so expressed these are not ‘powers’ in the usual lay or

¹⁵² A few other cities were incorporated during the period. See generally Bourinot, *Local Government in Canada*, especially 54-5.

political sense, being as much restrictive as facilitative.¹⁵³ Even in the grant of general corporate powers the act includes some interesting modifications, which could be considered restrictive, or at least directive. For instance, the ability of municipal corporations under the act is not to hold real property *simpliciter* as is/was the general rule for corporations, but rather to hold it within the boundaries of the municipality.¹⁵⁴ Similarly, the stipulation that the property owned is to be “for the use of the inhabitants thereof” can be seen as analogous to the practice of restricting a business corporation’s activities to its corporate objects, but is also suggestive of an attitude of suspicion, or at least caution, on the part of the drafter. The implication is that municipal real property should be for direct use by residents, not for indirect use by way of corporate investment or speculation.¹⁵⁵

The inaugural corporations in each gradation were listed by the schedules as I have indicated, but the act assumed that new units would qualify at each level as the province grew, and included a general incorporation procedure, at the time a still a relative novelty.¹⁵⁶ Each gradation had its own variations of constitutional and electoral rules for existing and new units. The first clauses of each part set out these superstructural rules: how to divide a town into electoral wards, when and where and how elections and inaugural meetings should be held, the continuation of boundaries, and a process for the initial appointments of officers.

¹⁵³ The classic work on the history of the corporate concept is John P. Davis, *Corporations: A Study of the Origin and Development of Great Business Combinations and of Their Relation to the Authority of the State*, 2 vols. (New York, London: G. P. Putnam’s Sons, 1905). See also Colin Arthur Cooke, *Corporation, Trust and Company; An Essay in Legal History* (Manchester, Eng.: University of Manchester Press, 1950) and David Millon, “Theories of the Corporation,” *Duke Law Journal* 1990, 2 (1990): 201-62.

¹⁵⁴ Later, exceptions were granted for cemeteries, and industrial farms and the like which could be owned by urban entities at a certain distance outside their borders.

¹⁵⁵ The United Counties of Leeds and Grenville rented out several properties during this period. Investments in other corporations were personal property and thus not covered by this restriction.

¹⁵⁶ See R. C. B. Risk, “The Nineteenth Century Foundations of the Business Corporation in Ontario,” *University of Toronto Law Journal* 23 (1973): 270-306; Henry Butler, “General Incorporation in Nineteenth Century England: Interaction of Common Law and Legislative Process,” *International Review of Law and Economics* 6, no. 2 (1986): 169-88. As I noted in Chapter 1, Canada West/Ontario seems to have been the first jurisdiction of the anglosphere to apply the general incorporation model to municipal corporations: Taylor, “If Different, Then Why?”, 58.

Further framework and systemic rules are set out in Part VII, “Miscellaneous.” If the act is apportioned by number of clauses, rather than inches of print, this part, consisting of sections 107 to 211, comprises almost half the statute. There are no sub-rubrics in Part VII, and the sections are seemingly random in their order. Along with electoral rules, rules for arbitrations, the procedure involved in the judicial quashing of by-laws, the measure of damages in assessing damages arising from road widening, the effect of personal bankruptcy, and the prohibition on monopoly, can be found many provisions relating to the transition of functions between the defunct District Councils, the Quarter Sessions (which retained some administrative functions under the District Councils Act and a few after the advent of the Baldwin Act), and the newly formed or newly configured corporations. Thus, for example, section 109 provided that heads of corporations should be JPs ex officio, and section 114 that existing corporations would continue until replaced under the new statutory mechanism.

Most of the ‘must’ clauses in the act appear in Part VII, but at first glance these do not seem to have much to do with the stated purpose of the preamble. The rule that a Recorder had to be a barrister of five years standing, and the rules for eligibility for and exemption from grand jury service in cities, for instance, do not relate directly to local government.¹⁵⁷ However, these provisions make sense if the Act is looked at as a constitution, a bible of ‘who does what’ in local governance and also ‘what to do, what might be done, and how to do it.’ The Part VII clauses are predominantly managerial and directory, concerned with delineating the parameters and relationships of the various ‘low’ governments, jurisdictions and institutions with one other. The power relationships which emerge most clearly from this part are between siblings (other

¹⁵⁷ The Recorder was an urban magistrate.

municipalities) or cousins (the institutions of low law such as courts of quarter sessions and grand juries), rather than parent (province) and child (municipal corporation).

The Municipal Act as Facilitative: The Permissive Clauses

What may be thought of as the ‘true’ powers sections, the powers to make by-laws in respect to specified subjects, comprise only one section for each gradation of municipality in the 1849 act. But while consequently not numerous at the sectional level, each of these sections was substantial, containing multiple—and significant—subsections. The township by-law section, section 31, includes thirty-three subsections, that for counties (section 41) twenty-three, for incorporated villages (section 60) twenty-four, for towns (section 61) ten, in addition to those of incorporated villages, and for cities (section 107) six, in addition to those exercised by towns. Unincorporated ‘Police Villages’ had no power to enact their own by-laws—they were covered by the by-laws of the township in which they were situated and by the by-law-like provisions included in Part III of the act.

Looking at section 31 setting out subjects on which townships could pass by-laws as an example, it is notable how these ‘powers’ lists differ markedly from the general ‘heads’ of jurisdiction used less than two decades later by the drafters of the British North America Act. Granted, a few of the powers are set out in a relatively succinct manner, similar to sections 91 and 92 of the BNA act, such as subsection 4 of section 31, which allowed for by-laws to establish pounds and settle the fees therefor, subsection 21 for destroying or suppressing weeds detrimental to good husbandry, and subsection 25, for settling the height and description of lawful fences. However, some which appear relatively short and general should be seen in conjunction with others on the same subject. Thus subsection 28, “for enforcing the performance

of Statute or Road Labour, or payment of commutations in money therefor,” is given a separate section, but could as easily have been included in the more detailed and less discretionary subsection 27, which allowed for by-laws “empowering the landholders in such Township, to compound for the Statute labour by them respectively performable, for any term not exceeding five years, and any rate not exceeding two shillings and six pence for each day’s labour, and at any time before the labour compounded for ought to be performed, and by such regulations to direct to what officer in each Township such commutation money shall be paid, and how such money shall be applied and accounted for, and to regulate the manner and the divisions in which the Statute Labour shall be performed.”

Most of the powers provisions tend to the latter type, both complex (in the grammatical sense), and verbose. Hence we find section 31 subsection 19 allowing the passage of by-laws against “the running at large of horses, cattle, sheep, goats, swine and other animals, geese, turkeys and other poultry, and to impound or provide for the impounding...and for fixing the time of year during which such animals or poultry shall be permitted to run at large.” The itemization of the animals which could be the subject of such a by-law may speak to a lack of trust in the councils’ ability to make such by-laws, or recognition of the tradition of judicial requirement for explicit derogation of a common law right to allow animals to roam, or to an anticipation of judicial ‘narrowing’ of general powers, or a mere copying of precedent clauses, or some or all of these. Even more modifiers and qualifiers are included in subsection 20, empowering the council to make by-laws for “preventing, restraining and regulating exhibitions of wax figures, wild animals, puppet shows, wire dancing, circus riding and other idle acts or feats which common showmen, circus-riders, mountebanks or jugglers usually exhibit, practise or perform and requiring the payment of a sum not exceeding five pounds to the Township treasurer....imposing

a fine...in case they shall exhibit without such payment, and for the levying thereof by summary distress....whether the owners shall be known or not, or for the imprisonment of the parties offending, for any time not exceeding one calendar month and for the appropriation of such sums and may be received or recovered under any regulation or Bylaw....”¹⁵⁸

The provisos in the latter ‘power’ seem both indirectly and directly restrictive. Both forms of restriction abound in the act, usually incorporated in the grant of power itself. Indirect restrictions, arising from the use of adjectives and adverbs inviting subjective judgment, are ubiquitous. The use of the adjective ‘idle’ modifying ‘acts or feats’ may be merely idiomatic, a product of legislative drafting which still was conducted on a semi-amateur basis. Drafting was a task performed by lawyers, or by lawyers who were also legislators (Baldwin was both) but was not yet the methodical, systematizing speciality performed by in-house draftsmen it would become several decades later.¹⁵⁹

Many of the powers sections were likely copied from previous acts and charters, but whether or not the drafters originated the terms, they had the opportunity to include, exclude or modify. Whether the abundance of adjectives and adverbs may be taken as consciously inviting judicial second-guessing, they could have this effect. According to Peter Tiersma, notoriously vague and subjective qualifications like ‘wilfully/wilful’ and ‘recklessly/reckless,’ make statutes unworkable as stand-alone tools of governance.¹⁶⁰ The act bristles with the qualifier ‘reasonable’ (usually of punishment) but there are many other examples; for instance, animals impounded for

¹⁵⁸ Contemporaries used both spellings, ‘bylaw’ and ‘by-law,’ and often capitalized the first letter.

¹⁵⁹ The historiography on drafting is slight. See Neil Duxbury, *Elements of Legislation* (Cambridge, UK ; New York: Cambridge University Press, 2013), George Coode, *On Legislative Expression, Or, The Language of the Written Law* (London: B.W. Benning, c1845, n.d.), Jeremy Finn, “Legislative Drafting in Nineteenth Century Australia and the First Permanent Parliamentary Draftsmen,” *Statute Law Review* 17, no. 3 (1996): 90–114. It is unclear whether Baldwin was the sole drafter, or whether he had help, perhaps from frequent drafting collaborator William Hume Blake; private email from Michael Cross, 14 April 2013.

¹⁶⁰ Tiersma, Peter M., “The Rule of Text: Is it Possible to Govern Using (Only) Statutes?” *NYU Journal of Law & Liberty*, Loyola-LA Legal Studies Paper No. 2011-11 (9 March 2011), SSRN: <http://ssrn.com/abstract=1782130>.

trespassing “if not claimed in a reasonable time” could be sold (subsection 24). We have already seen that weeds ‘detrimental to good husbandry’ might be suppressed by by-law, not just any weed (or any husbandry). The power to “regulate driving and riding on or over any bridge” (section 13), on the other hand, seems to take the inherent dangerousness of this activity as understood. In other cases, the act seems to be accepting of local knowledge. By-laws regulating “pits, precipices and deep waters, or other places dangerous to travellers” (subsection 15) may be included in this category, or it may be merely directory, inviting councils to use their imaginations in this regard. In any event, it is noteworthy for our purposes that even without the modifiers inviting judicial discretion, the powers are framed narrowly; that is, there is no power to regulate agricultural practice, driving, or hazards per se.

More explicit restrictions appear within the subsections of the township ‘powers’ by-law as subordinate clauses. Many are clearly designed to protect the property rights of settlers vis à vis the corporation. Thus for example subsection 11, permitting the township to require proprietors of land adjacent to highways “which shall pass through a wood” to cut down and remove the trees “for a space not exceeding twenty-five feet on each side” or in default of compliance permitting an overseer to arrange the removal and sale of the timber to defray expenses, included a proviso that no such by-law “shall authorize or compel the cutting down of any orchard or shrubbery or of any trees planted expressly for ornament or shelter.” Similarly, by-laws concerning public roads—the building, maintaining, and altering of which were the mainstay of local government activity—could not authorize encroachment on any building, orchard, “pleasure ground” or garden without consent of the owner (subsection 10).

Other subsections of section 31 refer to the actual or potential over-riding authority of other statutes: subsection 7 allowed the council to provide for the remuneration of all municipal

officers “in all cases where the same is not or shall not be settled by Act of the Legislature....” The right afforded townships (and also incorporated villages, towns and cities) to licence taverns “where spirituous liquors or oysters, clams, fruit and victuals were to be drank or eaten therein” was also available only “when there exists no other provision by law” for the licensing of them, although municipalities were entitled to limit numbers. Similarly, by subsection 18 the municipality could (with a by-law) take stock in or lend money to “any incorporated Road or Bridge Company to which such Municipality shall have granted a licence to proceed with such work in accordance with the requirements of the Statute in that behalf” provided that the municipality should be “sufficiently interested to warrant them...taking such stock,” and also provided that the proceeds “go in reduction of the rates required to be levied for such purposes.”

In the 1849 act, for the first time in the jurisdiction, there was no cap placed on the amount of property taxes that could be levied.¹⁶¹ This right was given even to the most junior councils (township and village) and was rightly considered by most commentators at the time and since to be a most significant addition to local autonomy. But even in this case it was thought necessary to spell out a prohibition on sub-regional favouritism in setting the rate, which was to apply equally to the entire jurisdiction.¹⁶²

Subject to unspecified laws of the province, as well as to the by-laws of the county in which the township/incorporated village/town was situated, a residual power to make such by-laws “as the good of the inhabitants of such Township may in [the council’s] opinion require” appeared in the 1849 act. The inclusion of this power, similar to the general peace, order and good government (POGG) power granted the federal government by the British North America Act, afforded to first level incorporated municipalities (i.e. all except counties) with slight

¹⁶¹ For a history of assessment and taxation in Upper Canada, see Shortt, “Municipal History, 1791-1867.”

¹⁶² An exception to this rule was later made for ‘local’ improvement projects, discussed below.

variations in wording, bolsters the argument that the act was originally intended to empower local governments. However, the power was short-lived; it did not appear in the 1858 re-enactment or in subsequent consolidations. It is unclear what the legislature expected township councils to do with this power. Townships were given no express power to legislate for the relief of the poor in the 1849 act, so perhaps this was meant to be covered by the residual clause without the overt suggestion that it was a suitable activity for this level of municipality. Possibly mere internal matters of administration were presumed; the later consolidations that omitted the residual section did include a more specific power to regulate meetings and the conduct of members.

The powers of counties included county-level versions of those granted to townships, that is, to build county roads and county bridges, erect and maintain county buildings (court houses, gaols, houses of industry), and to borrow for these and other county purposes. County councils levied their own ‘county rate’ but were not given the right to collect taxes directly; instead they were to be allocated a share from the collections performed by junior municipalities within their boundaries.¹⁶³ Specifically granted to counties were: the ability to build grammar schools, to endow scholarships and subsidize impecunious students who were recommended by their teachers to attend the University of Toronto, to erect drains and watercourses (major projects presumably thought beyond the resources of townships), and to pay councillors for their attendance at meetings (albeit only prospectively, to take effect two years in the future).¹⁶⁴ The latter innovation was presumably due to chronic problems of non-attendance at district meetings under the District Councils Act and before that at Quarter Sessions. For councillors or justices of

¹⁶³ The spellings ‘gaol’ and ‘jail’ were both used during this period, although the former tended to appear more often, and was used in the statutes. I have used ‘gaol,’ except when quoting primary sources that used ‘jail.’

¹⁶⁴ 12 Vic. c.81 (1849), s.41.

the peace living at some distance from the district seat, the challenge of leaving one's farm four times a year to travel on poor roads and pay one's board and lodging without remuneration had been one of the chief reasons given for the implementation of township government in the 1849 act.¹⁶⁵ Other jurisdictions were given the right to compensate their members later in the period.

Any understanding of local autonomy must include the possibility that the jurisdiction impinging on the preferences and scope of action of any given township, village, or town would be as likely to be a sibling government, that is, a municipal corporation at a similar or different level, as to be the province. Many of the powers vested in county councils related to the roads and bridges spanning or connecting two jurisdictions that might otherwise have been neglected no-man's lands. Others revolved around the perceived need to mediate between the interests of adjacent townships, and between townships and villages or towns located within their borders. Counties were to have a supervisory function in respect to inferior units vis à vis each other and with regard to any ambitions these might have in aspiring to a 'higher' level of incorporation.¹⁶⁶

The greater trust accorded the county councils by the legislature is also hinted at by a differentiated penalty structure. Whereas townships were restricted to imposing fines of £5 and twenty-day prison terms for offenders (section 31 subsection 29), counties were allowed to fine up to £10 for the breach of any county by-law (section 42 subsection 20); the act was silent as to a county's ability to imprison those in breach of its by-laws. Both levels were allowed to levy rates and require tolls, again "according to any law which shall be in force in Upper Canada concerning rates and assessments" (subsection 23).

¹⁶⁵ Aitchison, "The Development of Local Government in Upper Canada," 179-80.

¹⁶⁶ This began with the original act, 12 Vic. c.81 (1849), s.41 (17) whereby the county council could unite new Townships with older ones if it was felt there were insufficient numbers. In later acts these powers over the status of inferior units became much more elaborate. For cities and counties, the government retained this function.

The local knowledge of the county councillors was also entrusted with the designation of police villages. Alone of all the municipal categories, there was no minimum number of households associated with the police village. On the petition of an unspecified number of residents of an unincorporated village, the county council could decide “that it may be expedient that the provisions of this Act....should be applied to such Village.”¹⁶⁷

The mere fact that a hamlet did not have the number of eligible (i.e. propertied adult male) householders to incorporate, or those who were eligible had no interest in petitioning to be recognized as an incorporated village, did not exempt a place from the issues attending population density. The rules included in the act for non-incorporated (police) villages tell us a great deal about the drafter’s (and likely society’s) ideas about the dangers inherent in urban-ness. The provisions can be traced to the rise of medieval towns and the concept of the *salus populi*.¹⁶⁸ Thus the act stipulated the height and composition of chimneys, the requirement that each household maintain a ladder and bucket, and other anti-conflagration measures. The only non-fire related provision for unincorporated villages was a prohibition against throwing “filth or ordure” in streets or public places in the village. Varying penalties for initial and subsequent breaches of each of these regulations were stipulated by the act, ranging from five to twenty shillings. Many fines were stated to be for each week of non-compliance.¹⁶⁹

Once a hamlet became a police village by the edict of the county council, it was to elect three police trustees, one of whom was to be the inspecting trustee. The act uses the permissive language that it “shall and may be lawful” for the resident freeholders and householders to hold

¹⁶⁷ 12 Vic. c.81 (1849), s.42.

¹⁶⁸ *Salus populi* means health (or welfare) of the people. See William J. Novak, *The People’s Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996); Friedman, *The History of American Law*, 3rd ed. 400-3.

¹⁶⁹ 12 Vic. c.81 (1849), s.51.

an election, but the election is treated as a fait accompli. There is no apparatus to object, the date is set by the act, and the limits of the village and the place of the election are to be set by the county council. The collector of the township was ordered to provide the roll to the presiding officer, and if the nominees were not present, the voters might elect someone *in absentia* who, if found in neglect of his office, would be subject to penalties.¹⁷⁰

Extant incorporated villages (set out in one of the several schedules to the act) and those that could become incorporated by following the administrative procedure set out, were governed by Part IV. These councils were invited to make their own regulations for fire prevention under a lengthy sub-clause which does not announce that purpose, but itemizes a number of actions which are clearly directed to this end. The effect of some of these—forcing inhabitants to suppress fires or pull down adjacent houses—could trench substantially on the liberties of the subject.¹⁷¹ In addition, incorporated villages (and the towns and cities which piggy-backed on these jurisdictions) could pass regulations (in their discretion) concerning chimneys, ashes, buckets, ladders and scuttles, as well as the keeping and transporting of gunpowder. They were permitted to set up a municipal magazine for storing arms and compel such storage, to proscribe the use of carriage lights in liveries or carpentry shops, regulate manufactories “in danger of causing or promoting fire,” purchase hook and ladder equipment, give medals for “persons who shall distinguish themselves at fires” and assist the widows and orphans of persons killed by fire-related accidents, as well. A subsequent subsection allowed for by-laws authorizing the entering of dwelling houses, appointing fire wardens and regulation of such fire companies “as may be raised with the sanction of the Corporation of such Village.”¹⁷²

¹⁷⁰ 12 Vic. c.81 (1849), ss. 42-47.

¹⁷¹ 12 Vic. c.81 (1849), s.60 (13). William Novak notes that such regulations run counter to the American ‘master narrative’ of liberty: Novak, *The People’s Welfare*, 7.

¹⁷² 12 Vic. c.81 (1849), s.60 (14).

The likelihood that an incorporated village would possess an existing market is adverted to, with the concomitant “assize of bread,” prohibition of forestalling, and other weights and measures provisions.¹⁷³ Other expectations of urban life—the necessity of a lockup (for fewer than ten days imprisonment), the possibilities that the village might include a harbour, wharves and/or a ferry, and experience ‘immoderate’ drivers or riders on bridges, or fishing in public waters—are all provided for. Taverns were to be licensed and taxes levied, though the number of taverns and amount of taxes were to be in the village councillors’ discretion, as was the loan of money to counties.¹⁷⁴

Some other suggested subjects for village by-legislation might have been grouped under the heading of public health or nuisance, if the legislation had been so structured. These include provisions for clean (or at least ‘unfouled’) public sources of water, for the erection and maintenance of public cemeteries (with penalties on physicians and sextons for failure to keep mortality records or for improper burial), for the abatement of public nuisances such as privy vaults, slaughterhouses, gas works, distilleries, ‘manufactories,’ vagrancy, fire-crackers, public bathing, charivaris, “obscene or indelicate language” and loud noises.¹⁷⁵ Similarly, one subsection gave permission for by-laws concerning what we might call morals offences, without the use of this term (or any other heading or generalization). But the tenor of the clause is unambiguously moralistic. The assumption that villages (but apparently not townships) might be interested in enforcing the Sabbath, preventing cruelty to animals and the sale of alcohol to children, licensing or preventing gambling, horse-racing and bowling alleys, and regulating public drunkenness, circuses and theatres, speaks to Victorian concerns and expectations

¹⁷³ 12 Vic. c.81 (1849), s.60 (6), (8). See Lawrence Friedman on the mindless copying of charter precedents that led one state to refer to the “size” of bread; Friedman, *The History of American Law*, 401.

¹⁷⁴ 12 Vic. c.81 (1849), s.60 (11), (7), (17), (18), (19), (5).

¹⁷⁵ 12 Vic. c.81 (1849), s.60 (12), (16), (15), (10).

regarding urban life.¹⁷⁶ Subsection 20, a stand-alone anti-vandalism provision for prevention of injury to shade or ornamental trees and sign-boards, can be seen as a harbinger of future urban aesthetic concerns.

Some of the powers stipulated for villages anticipate conflicts between the citizen and the low state. I have already made note of the rights of the corporation to enforce expropriation and cooperation in the case of firefighting and fire prevention. But where there was no emergency, the powers of the corporation to adversely affect the property rights of residents were even more strictly curtailed for villages than for townships. The power to lay out streets, which might be considered an essential function of urban governance, is not only made subject to the rights of citizens not to have their property encroached on, as was the case in townships, but additionally made subject to the consent of the owners in writing.¹⁷⁷

Another possibly significant, but also possibly coincidental, difference in wording is to be found in the clause setting out the residual power for villages (and for the larger urban units), which is more detailed than that set out for townships. By section 60 subsection 23 villages are given authority for “making such other by-laws for the peace, welfare, safety and good government of such village....as are not repugnant to this or any other Act of the Parliament of the Province [of Canada] or of the Parliament of Upper Canada or to the general law for that part of the province.” Provisos are added: that no person should be subject to a fine of more than £5 exclusive of costs or more than thirty days for the breach of any by-law, and that no person should be compelled to pay a fine greater than £10 for refusing or neglecting to perform the

¹⁷⁶ 12 Vic. c.81 (1849), s.60 (9).

¹⁷⁷ 12 Vic. c.81 (1849), s.60 (1).

duties of any Municipal office when duly elected or appointed thereto.¹⁷⁸ In keeping with the functional approach of the legislation, the extra powers granted to towns and cities in Parts V and VI (in addition to those appointed to villages) do not differ in degree of generality. Thus provision is made for towns to enact by-laws for alms houses, houses of refuge and industry, an industrial farm (of no less than two hundred acres and within ‘convenient’ distance of the town), to pay for gas lighting, for street cleaning and livery stables.¹⁷⁹

The only deviations from the model set for townships and villages are two interesting precursors of municipal zoning. Towns and cities were given the right to assess “owners as may be immediately benefitted,” for upgrades to their own streets and sidewalks, which later became known as local improvement projects (subsection 5). However, councils did not receive the right to initiate such projects themselves until quite late in the period; originally all such projects were to be commenced on at the initiative of the affected ratepayers.¹⁸⁰ The proportion of the benefitted consenting owners and the amount of property value they represented was also set out by the act, so that the council would in theory at least have little discretion in making such improvements. The entitlement allowing council to determine density and building materials in selected areas of a town (or city), another embryonic zoning power, for “preventing wooden buildings from being erected in thickly built parts of such Town” is somewhat vaguely (and oddly) bundled in with the section allowing for institutions for the poor (subsection 1). Initially cities were given only one unique right, that of regulating the erection of buildings and prohibiting wooden buildings and fences entirely.¹⁸¹ Clearly, mere concentration of population

¹⁷⁸ There was no such thing as the parliament of Upper Canada at the time, even under the name Canada West, which the legislature tended not to use during this entire period. For a discussion of the terminology of dualism, see Careless, *The Union of the Canadas*, 210.

¹⁷⁹ 12 Vic. c.81 (1849), s.107.

¹⁸⁰ 29-30 Vic. c.51 (1866), s.301, s.302, and s.303 set out the procedure in detail.

¹⁸¹ 12 Vic. c.81 (1849), s.107.

was not seen as triggering a greater claim to tools of self-governance, only as generating additional issues that council was permitted to address if it wished.

Between consolidations, acts were passed to give one or more levels of municipality piecemeal powers to address certain specified issues. These were often subject to restrictions and included a level of detail that reinforces the established pattern of top-down direction. For example, in 1853 the legislature permitted municipal councils to licence peddlers and hawkers, retail shops selling wine, and billiard tables. The same year, townships and counties gained the right to assess for local improvements for drainage and other measures that promised to positively affect some but not all property values, on the condition that a request was made by ratepayers, limits were described and notices given, and had the approval of two-thirds of the affected residents.¹⁸² The latter act also gave townships the explicit right to levy a poor rate, but only if a request was made in advance by a majority of voters, with notice, to last only for the year in which it was made. This act also extended to towns and cities the ability to fix annual rents for drainage, to subscribe to gas and water companies by rates or debentures by by-law to be signed and countersigned, with four public notices and on the consent of a majority of qualified electors.¹⁸³ A clause clarified a right of hearing for anyone challenging the signatures required for any by-law requiring consent.¹⁸⁴ Presumably because it was a health-related issue, town and city councils could pass by-laws to expropriate private property for common sewers, subject to compensation to be determined by arbitration.¹⁸⁵

¹⁸² Consolidated Municipal Loan Fund Act, 16 Vic. c.181 (1853), s.1 (1), s.14.

¹⁸³ 16 Vic. c.181 (1853), s.5. The mayor of any municipality subscribing £2500 was to be an ex officio director and vote the shares of the municipality

¹⁸⁴ 16 Vic. c.181 (1853), s.37.

¹⁸⁵ 12 Vic. c.81 (1849), s.195.

As we have seen, most of the powers clauses included internal restrictions, setting prior limits or conditions on the scope of the by-law. What might be called external restrictions, necessary pre-requisites or co-requisites to the passage of a by-law, are most often to be found in provisions relating to financial matters. The requirement for an initiating petition, as in the case of a local improvement levy, was this type of external restriction. In the later municipal consolidations, mandatory arbitration processes for claims against municipalities for compensation arising when by-laws had the effect of expropriation were prescribed in great detail. The 1849 act also prohibited municipalities acting as bankers. By-laws for raising money had to meet rules for recitals, and repayment procedures, including sinking funds, were to be expressly included in the by-law.¹⁸⁶ These rules became even more detailed and stringent in later versions of the act. The Municipal Loan Fund Acts added another obstacle to councils wishing to raise funds for capital projects, including aid to railways and road construction companies, requiring the prior approval of the ratepayers and Governor-in-council before a by-law could be legally promulgated.¹⁸⁷ One requirement—cabinet approval—was dispensed with a few years later, but the requirement to hold a poll of ratepayers was retained.¹⁸⁸

The first consolidation of the municipal act, in 1858, while making some stylistic changes (the acts start to look more ‘modern’ to the 21st century observer) continued the overall particularizing techniques of the 1849 act.¹⁸⁹ Some limitations were lifted and new powers were granted according to the circumscribed pattern already established. As I have already noted, the residual powers clauses disappeared in 1858. However, all municipalities were henceforth able to

¹⁸⁶ 12 Vic. c.81 (1849), s.183, s.184, s.177.

¹⁸⁷ Consolidated Municipal Loan Fund Act, 16 Vic. c.22 (1852), s.9, s.10, s.11.

¹⁸⁸ 18 Vic. c.131 (1855), s.1.

¹⁸⁹ For instance, subheadings were added and some of the ‘omnibus’ style clauses were disaggregated: 22 Vic. c.99 (1858).

aid agricultural societies, compel commutation of statute labour (at no more than \$1 per day), to take a census, and to fine any elected person up to \$50 for the neglect of his duties.¹⁹⁰ Cities and towns could legislate to licence intelligence offices, regulate gas inspection and appoint a commissioner for gasworks and require residents to remove snow.¹⁹¹ Indecent exposure was added to the section dealing with public morals.¹⁹² Townships and villages could henceforth pass by-laws to tax dogs and destroy any found running at large.¹⁹³ Also in 1858, a few municipalities interested in attracting transit companies were permitted (on the petition of three-quarters of ratepayers) to grant bonuses, “inasmuch as the construction of Railways and of other roads has been found to enhance to the largest amount the value of property within easy access to these lines of traffic.”¹⁹⁴ A few years later a crop failure in Upper Canada prompted an act to allow county councils to pass by-laws to purchase up to \$20,000 of seed.¹⁹⁵ The act stipulated that the amount so raised could be used for no other purpose, and the by-law was required to include rules for repayment.

In the 1866 consolidation some tepid trust was placed in the councils, allowing them to make regulations for their own conduct and proceedings if not otherwise specified by the act and not contrary to any other law.¹⁹⁶ Explicit permission was given to urban councils to number houses.¹⁹⁷ By an amending act in 1868 city councils lost their right to supervise their police forces to appointed boards of police; however the right to dissolve such boards was restored with

¹⁹⁰ 22 Vic. c.99 (1858), s.263, s.212, s.317.

¹⁹¹ 22 Vic. c.99 (1858), s.290 (1-5), s.291 (8, 9, 12).

¹⁹² 22 Vic. c.99 (1858), s.275.

¹⁹³ 22 Vic. c.99 (1858), s.258.

¹⁹⁴ Bruce and Wellington Counties, their sub-municipalities and nearby municipalities were singled out for this exception, presumably with a particular but unnamed railway company in mind: 22 Vic. c.39 (1858), s.350.

¹⁹⁵ *An Act to enable County Councils to raise money for assisting persons in certain cases to seed their land, and for other purposes*: 26 Vic. c.1 (1863).

¹⁹⁶ 29-30 Vic. c.51 (1866), s.191.

¹⁹⁷ 29-30 Vic. c.51 (1866), s.296 (48-9).

the third consolidation, in 1874.¹⁹⁸ The 1868 act also provided for the sale of mineral rights (by public auction, with the proviso that public travel be respected), and allowed municipalities to regulate tire widths—on macadamized roads only.¹⁹⁹ Factories and companies building public works and facilities were eventually added to the list of businesses for which municipalities (with the assent of electors) could establish bonuses.²⁰⁰

This pattern continued throughout the rest of the period. Though more ‘powers’ were added than subtracted, it is difficult to see these changes as significantly expanding local autonomy. The legislature was not averse to doling out incremental powers to municipalities to address particular problems or approved projects, but in many cases the rights were circumscribed, usually within the ‘may’ clauses themselves.

The Municipal Act as Compulsory: The Mandatory Clauses

As discussed in Chapter 1, John H. Taylor found relatively few instances of ‘must’ clauses—duties and requirements—in the Municipal Act of 1849.²⁰¹ As with the ‘may’ clauses, Taylor did not seek to determine the weight of the ‘must’ clauses he counted. He did not consider the modes of enforcement, nor whether these can be considered to amplify the burdens. He is correct that there are few direct duties and requirements of corporations to be found in the act (if this is indeed what he had in mind as ‘must’ clauses), but there are many which were designed to work indirectly, by placing a personal legal duty on a clerk or other surrogate. Both direct and indirect duties encroached on the freedom of action and the funds of local governments.

¹⁹⁸ 31 Vic. c.30 (1868); 37 Vic. c.16 (1873).

¹⁹⁹ 31 Vic. c.30 (1868), s.37, s.45.

²⁰⁰ 34 Vic. c.30 (1871) 42 Vic. c.31 (1879).

²⁰¹ Taylor, “Urban Autonomy in Canada,” 478–500.

In the Municipal Act of 1849 the first corporate duties mentioned were the requirements for every former district council to set up townships and begin the process of holding elections and meetings according to the provisions of the act.²⁰² It would appear these were meant to be directory—no enforcement procedures were included, although a process was set out for inhabitants of a township to take matters into their own hands if necessary. Each municipality was to hire a clerk and treasurer, who were to be paid twice a year from municipal funds. The amount of the clerk’s remuneration was left up to the council—presumably it was assumed the amount would be adequate to attract a competent functionary, as a council could not realistically carry on operations otherwise, as Robert A. Harrison noted in his *Municipal Manual*.²⁰³ The treasurer’s salary was originally based on a percentage of funds under his control and specified by the province; later municipal councils were allowed to substitute a fixed stipend or salary.²⁰⁴

Other duties were more pointedly mandatory, especially for counties. County councils were required to maintain the “Shire Hall, Court House and Gaol and any house of corrections,” the expenses of which were “chargeable upon the County,” implicitly at the initiative of the sheriff, judges or other administrators of the justice system.²⁰⁵ Similarly, county roads: once ‘assumed’ by the county council as a road in which more than one township has an interest, it was the duty of the council to cause such road to be built “in a good and substantial manner.”²⁰⁶ No specific remedy was given for default, but it is evident from other provisions of the act that the legislature assumed that the prerogative writ of mandamus would be available. There was no

²⁰² 12 Vic. c.81 (1849), s.3.

²⁰³ Harrison, *The New Municipal Manual*, 1859, 116, note k: “It appears to be imperative on the Council to appoint a Clerk. Convenience, if not duty, however, will at all times render one necessary.”

²⁰⁴ In 1858 councils were permitted to pay the Treasurer by salary or percentage: 22 Vic. s.174 (1858).

²⁰⁵ 12 Vic. c.81 (1849), s.41 (2).

²⁰⁶ 12 Vic. c.81 (1849), s.37.

provincial oversight for roads, and it was presumably expected that this type of duty would be brought to the attention of the courts by individual residents or other parties who had an interest.

The common law quasi-criminal remedy for failure to maintain roads was not referred to in the 1849 act, but was expressly inserted into the 1858 consolidation. By section 324 of this act, all councils could be fined for the misdemeanour of failing to maintain public roads, the amount to be in the court's discretion. The drafter added that this remedy was not to be in lieu of civil damages for injury sustained by reason of the default, but did give the municipality some relief in the form of a limitation period—any such civil action was to be brought within three months of the date the plaintiff sustained the damages. The next consolidation gave the municipality a further loophole, clarifying that the section did not apply to roads laid out without the consent of the corporation expressed by by-law.²⁰⁷

Taylor did not itemize his 'must' clauses (nor indeed his 'may' clauses). It would be easy to overlook the less obvious mandatory clauses that appear sporadically throughout the act(s). Several involved a liquidated sum as penalty that could be summarily sued for if not provided by the municipality whose duty it was to arrange its payment. Hence by the consolidation of 1866 every county council was required to provide by by-law that a "sum not less than twenty dollars shall be payable as a reward to any person or persons who shall pursue and apprehend...a horse thief."²⁰⁸ The puzzle here is why the intermediate step of a by-law was included. The meta-rule was that all municipal actions required a by-law; perhaps it was because there was latitude to increase the amount of the reward that the legislation declared the provision was to be expressed by-legislatively. When the ballot was introduced in 1874, the act setting out the process stipulated that the clerk was to cause the ballots to be printed at the expense of the municipality.

²⁰⁷ 29-30 Vic. c.51 (1866), s.339.

²⁰⁸ 29-30 Vic. c.51, s.354 (26).

The duty here is implied, as is the remedy; if not reimbursed, the clerk could rely on the statute to sue the municipality to cover his expense.²⁰⁹

By an act to amend the Municipal Loan Fund (MLF) act, passed in 1857 at the height of a depression that led to a rash of municipal defalcations, repayment of sums borrowed by municipalities from the crown was also made recoverable by the province, at least in theory.²¹⁰ The problem of the non-exigibility of corporate assets, which, after all, belonged to the public not to the council, was dealt with by exempting schools, gaols, fire-fighting equipment and court houses, but making other municipal property subject to execution. Since there was likely little property other than that which was exempted, this would not be terribly helpful, but the possibility was left open. More likely to be effective was the subsequent clause which allowed the government to withhold a defaulting municipality's share of the proceeds of the sale of the Clergy Reserves until it brought its MLF account into good standing. The Town of Brockville was caught by this provision, and struggled to restore its Clergy Reserve funding with pleas to the province for years.²¹¹

Also likely to have an impact were indirect duties, whereby the legislature would assign the responsibility for enforcing municipal duties to salaried officers or elected politicians personally, either alone or in addition to the corporation. In England, the practice of imposing personal legal duties to sustain local governance was a long-standing one, although confined to providing personnel for parish offices, rather than ensuring statutory edicts were carried out.²¹² This enforcement had never been applied to the position of justice of the peace, which was

²⁰⁹ Dominion Elections Act, 38 Vic. c.28 (1874).

²¹⁰ See Baskerville, "Transportation, Social Change and State Formation, Upper Canada, 1841-1864," 233-56, 238.

²¹¹ AO, Town of Brockville Fonds, Council Minutes, F1558-1, MS 610, Reel 2.

²¹² Sidney Webb and Beatrice Potter Webb, *The Development of English Local Government, 1689-1835*, vol. 1 *The Parish and the County*, Book 1 (London: Longmans, Green and Co., 1906; reprinted London; New York: Oxford University Press, 1963).

presumed to be a sought-after honour, rather than a disliked civic chore. Any nonfeasance by the rulers of the county might result in non-renewal of the office; malfeasance, reviewable by the superior courts in theory, might be tolerated in practice.²¹³

Whether local politicians in Upper Canada were to be given the respect accorded to JPs or the more harsh command and control considered suitable for English parish officers was a question resolved more or less in favour of the latter. By the 1849 act, those elected to municipal office could be fined for refusing to serve; a refusal to take office or take the oath of office within twenty days of the election or refusal to administer an oath to a councillor-elect could result in a fine between two and twenty pounds.²¹⁴ Elected politicians were also made specifically subject to section 123, whereby false swearing under the act was punishable by the “pains and penalties of wilful and corrupt perjury,” and to section 125, requiring them to deposit the oaths they swore on behalf of others (as ex officio JPs) in the appropriate place, presumably the clerk’s office, within eight days or be guilty of a misdemeanour. However, though these requirements and penalties were continued, a more forgiving attitude to members of councils was soon apparent in amendments allowing for resignations during an elected term, albeit subject to the consent of the majority of the council.²¹⁵ No doubt the expectation was that the fellow councillors of the would-be former-member would be the best judges of the bona fides of his request and, indeed, of the benefit to the council of a resignation (which they technically might even instigate under the amendment which allowed a council to determine its own rules for proceeding mentioned above). As well, since all elected offices were for one term only with no

²¹³ See Norma Landau, *The Justices of the Peace, 1679-1760* (Berkeley: University of California Press, 1984), Hay, “Dread of the Crown Office” 19-45. JPs in Upper Canada/Canada West had even greater invulnerability; the worst that could happen to a habitually invisible or poorly performing JP was non-renewal of his commission, which in any event had much less social value in the colonial context: Aitchison, “The Development of Local Government in Upper Canada,” 33.

²¹⁴ 12 Vic. c.81 (1849), s.130.

²¹⁵ 16 Vic. c.181 (1853), s.9 (38).

limit on re-elections, the electoral process might have been trusted to take care of any problem councillors fairly quickly.

Council heads—mayors for cities and towns, reeves for townships and villages, and wardens for counties—were assigned more legal responsibilities than were their colleagues on council. They were commanded to counter-sign by-laws (with the clerk); but, perhaps since failure to do so did not invalidate the by-law, no penalty was specified for their failure to do so. Carelessness with by-laws for Municipal Loan Fund loans added imprisonment as a disincentive for anyone involved.²¹⁶ A head of council could also be caught by section 10 of the Act to Provide for the Registration of Debentures issued by Municipal and other Corporate Bodies, which provided for imprisonment between three and twelve months with no option for a fine.²¹⁷ In 1866, heads of council were also given the duty of overseeing the operations of the corporation. It is not specified what this meant exactly, but presumably they were to see that the committees and perhaps the staff performed their tasks.²¹⁸ Because this was such a vague requirement there would probably have been little likelihood of being fined for insufficient oversight, though a clause that appeared in the same consolidation in the miscellaneous part that provided for fines or imprisonment for any breach of duty by anyone could have been employed against a negligent head of council.²¹⁹

The one elective office that did not follow this model was that of Police Village Trustee. This post had more in common with the parish impressments of the English past than the elected (and soon to be at least partly remunerated) membership on councils of incorporated local

²¹⁶ 29-30 Vic. c.51 (1866), s.207.

²¹⁷ 22 Vic. c.91 (1858).

²¹⁸ For example, 29-30 Vic. c.51 (1866) s.123.

²¹⁹ 12 Vic. c.81 (1849).

governments.²²⁰ Not only was the trusteeship an unpaid post until very late in the period, but its duties were backed up by monetary penalties. The trustee was charged with enforcing the fire and health regulations set out in the act to the extent of actively prosecuting offenders, and could be fined twenty shillings by a justice of the peace at the request and on the evidence of any of his neighbours who had standing as “inhabitant householders.”²²¹

Some local officials—gaolers, path masters, constables, surveyors, auditors, tavern inspectors, overseers, and pound keepers—are referred to in the act, but their duties and the enforcement thereof are mostly left up to the councils that appointed them and to whom they reported. One exception to this general rule was the constable. Evidently this was expected to be an unpopular task; section 158 provided that anyone liable to serve could be sued, and the sum of five pounds could be granted to anyone who would sue him, as an added incentive.²²² At the next level of importance were assessors and collectors, whose duties were set out in other acts, but whose activities could likely be covered by the general penalty provision mentioned above in regard to elected members having a statutory duty to supervise. The appointment of auditors (two per corporation) was to be one of the first actions of any council. These part-time officials were to examine the accounts and “publish a detailed statement of receipts and expenditures in two newspapers” in the jurisdiction or nearby, and to file the same in duplicate within one month with the clerk, where they were to be open to inspection by any inhabitant.²²³

²²⁰ By-laws for per diem remuneration for township councillors in this subsection were allowed, provided these would not take effect until after the next election: 16 Vic. c.181 (1852) s.9 (4).

²²¹ 12 Vic. c.81 (1849), s.48. There were property qualifications for trustees, and it is quite possible that there was a social status associated with the position. Unlike most private prosecutions under the act, there was no *qui tam* financial incentive of half the fine to the informer/witness; the entire fine, recoverable by distress if necessary, was payable to the village.

²²² 12 Vic. c.81 (1849), s.158.

²²³ 12 Vic. c.81 (1849), s.144.

The sheriff, although locally based, was a provincial appointee, and most of his duties were dealt with by the statutes concerning the administration of justice. With regard to municipal matters, the sheriff was in some respects adversarial to the council, a variation on his general assignment to provide for execution in debt collection matters, complicated by the status of municipalities as public corporations. According to section 179 of the Municipal Act, if a sheriff were to receive a writ of execution against a municipality, he was to deliver it to the treasurer with a statement of fees and calculation of the amount due at the date of service. If the debt was not paid within a month of receipt of the writ, the Sheriff was to examine the assessment rolls on file in the office of the Clerk, strike a rate of his own initiative, then direct the collectors to include a column on their rolls for this rate. The collectors and assessors, though contract employees of the council in vied-for positions without any security of tenure, were thus to be co-opted to assist in this proceeding. They could cavil only at their own risk, as the statute stated they could be proceeded against by attachment or otherwise to ensure the completion of these duties.

The most important of the employees were the clerks and treasurers.²²⁴ Some of the duties attached to these roles were also set out in other acts, but those included in the Baldwin Act indicate their centrality to municipal, and indeed provincial governance. I have already noted that it was incumbent on all incorporated municipalities to appoint officers for these roles—who would continue in their office until replaced—and pay them “what is just and reasonable.”²²⁵ The primary duty of the treasurer was, as might be expected, to keep the books (stipulated to be in accounts separate from his own), to give security by means of a bond guaranteed by himself and

²²⁴ Treasurers of cities were called chamberlains.

²²⁵ 12 Vic. c.81 (1849), s.169.

another ratepayer, do “all assigned duties,” and hand over books and money when requested.²²⁶

It was felt advisable to include an assertion that the corporate books “are chattels belonging to the corporation” and that any failure to hand over chattels or money when demanded should be held to be fraudulent embezzlement, a felony for which the treasurer could be convicted, such conviction not to replace any other civil remedy.²²⁷ Treasurers of counties were responsible not only to the county, but also to its sub-corporations, for whom they performed a supervisory role at times.

As was the case for members of council and collectors, but most likely to apply to those keeping ultimate track of the funds, treasurers faced additional liabilities under the Municipal Loan Fund Acts: anyone “wilfully neglecting or refusing to perform or concur in performing any official act requisite for the Collection of the said rate, or misapplying [the funds] shall be held guilty of a misdemeanour, and any such Treasurer...and his sureties shall moreover be personally liable for any sum which, by reason of such neglect....shall not be paid over to the Registrar General at the time required.”²²⁸ Furthermore, after December 1, 1859, if a treasurer paid out any amount before the sum owed the Receiver General was paid, “he shall be deemed guilty of a misdemeanour, and shall moreover be liable for every sum so paid....”²²⁹ With the peril of incurring civil and criminal penalties the government presumably hoped to make the treasurers their local watchdogs, in effect spying on their employers in order to prevent municipal councils from playing fast and loose with the Province’s money.

For clerks, a job description—the ‘general duty’—was set out in the statute: “to record in a book to be provided for that purpose all the proceedings...and to make regular entries of all

²²⁶ 12 Vic. c.81 (1849), s.171, s.172

²²⁷ 12 Vic. c.81 (1849), s.174.

²²⁸ 22 Vic. c.15 (1858) s.4.

²²⁹ 22 Vic. c.15 (1858) s.3 (4).

resolutions and decisions and to record the vote of every person present entitled to vote if required by any member and preserve and file all accounts...and to keep the books [and] records...which shall be open to all without fee or reward...at all seasonable times and hours.”²³⁰

The clerk was further bound to furnish copies of by-laws on request at the rate of six cents per hundred words (or lesser sum if the council so ordered).²³¹ The clerk was also to certify and apply the corporate seal to all by-laws (which were also to be signed by the head of council). The act and its consolidations and amendments and collateral legislation entailed duties for the clerk in the running of elections, municipal, provincial and eventually federal. He was also obliged to carry out the statutorily mandated procedures for notices of those by-laws which would affect the rights of residents, such as road openings and closings. All of these were added to and clarified as time went on. In most cases the penalty for non-compliance with these duties was a fine on conviction before two justices of the peace. Clerks also had numerous duties (with their own similar penalties) under the assessment, jury and other acts.

The most onerous duties for clerks arising from the municipal acts related to information gathering and management.²³² By section 180 of the 1849 act, the clerk, on behalf of the municipality, was to send to the Provincial Secretary every year before the 31st of January an annual account of the corporation's debts with particulars of the original debt, interest, payments and current balance. In 1852 this requirement was expanded significantly, when the government presumably realised the goldmine of information available at no direct cost to itself that could be wrung from and paid for by municipal jurisdictions by means of a statutory command and the

²³⁰ 12 Vic. c.81 (1849) s.170.

²³¹ 22 Vic. c.15 (1858) s.199.

²³² See Bruce Curtis, "Canada Blue Books and the Administrative Capacity of the Canadian State, 1822-67" *Canadian Historical Review* 74, no.4 (1993): 535-65, also Bruce Curtis, *The Politics of Population: State Formation, Statistics, and the Census of Canada, 1840-1875* (Toronto: University of Toronto Press, 2001).

threat of personal punishment for non-compliance. Within one week after the first day of January, the clerk of a township, incorporated village or town, was obligated to make an information return to the clerk of the county in which the municipality was situated for the past year. A sense of the magnitude of the information gathering duties is evinced by the particulars required in 1853:

1. Number of persons assessed.
2. Number of acres assessed.
3. Total of rentals of real property.
4. Total of yearly value other than rentals of real property.
5. Total actual value of real property.
6. Total of taxable incomes.
7. Total value of personal property.
8. Total yearly value of personal property.
9. Total amount of assessed value of real and personal property.
10. Total amount of taxes imposed by By-laws of the Municipality.
11. Total amount of taxes imposed by By-laws of the County.
12. Total amount of taxes imposed by By-laws of any Provisional County Council
13. Total amount of Lunatic Asylum or other Provincial tax.
14. Total amount of all taxes as aforesaid.
15. Total amount of income collected or to be collected from assessed taxes for the use of the Municipality.
16. Total amount of income from licenses.
17. Total amount of income from public works.
18. Total amount of income from shares in incorporated Companies.
19. Total amount of income from all other sources.
20. Total amount of income from all sources.
21. Total expenditure on account of roads and bridges.
22. Total expenditure on account of other public works and property
23. Total expenditure on account of stock held in any incorporated Company.
24. Total expenditure on account of schools and education, exclusive of School Trustees rates.
25. Total expenditure on account of the support of the poor or charitable purposes.
26. Total expenditure on account of Debentures and interest thereon.
27. Total gross expenditure on account of Administration of Justice in all its branches.
28. Amount received from Government on account of Administration of Justice.
29. Total net expenditure on account of Administration of Justice.
30. Total expenditure on account of salaries, and the expenses of Municipal Government
31. Total expenditure on all other accounts.
32. Total expenditure of all kinds.
33. Total amount of liabilities secured by Debentures.
34. Total amount of liabilities unsecured.

35. Total liabilities of all kinds.
36. Total value of real property belonging to Municipality.
37. Total value of stock in incorporated Companies owned by Municipality.
38. Total amount of debts due to Municipality.
39. Total amount of arrears of taxes.
40. Balance in hands of Treasurer.
41. All other property owned by Municipality.
42. Total assets.²³³

The county clerk was to compile all this information by the first of February for all the jurisdictions within its purview for the provincial secretary, whose own duty to lay the information before Parliament was consequently greatly eased. City clerks were to furnish the same information directly. Items were added to the list as time went on; the only subtraction came with the abolition of the Lunatic Tax.²³⁴ In 1855 a second annual return was demanded from the clerks, this time to the Receiver General, for the appropriation of moneys arising from the clergy reserves.²³⁵ And again, in case of default of transmission of the information by sworn affidavit in the obligatory form the clerk was to be personally liable to a penalty of twenty dollars, to be paid to the Receiver General for the use of the Province.²³⁶ Similar requirements were set out by the Assessment Act. Later the Voters' List Acts and Tavern Licence acts mandated returns related to those subjects with concomitant penalties for non- or misfeasance.²³⁷

In effect, by using criminal sanctions, the provincial government pierced the municipal corporate veil with a vengeance, co-opting the mini-bureaucracies who were both mandated and

²³³ 16 Vic. c.163 (1853).

²³⁴ 20 Vic. c.8 (1857).

²³⁵ 19 Vic. c.1 (1855) s.157.

²³⁶ 19 Vic. c.1 (1855) s.158.

²³⁷ An Act Respecting Voters Lists, 37 Vic. c.4 (1873) s.12: "...for every name erroneously inserted in or omitted from any list of voters or duplicate required under this Act the Clerk offending shall pay and forfeit to any person who may sue therefor the sum of one dollar and shall also pay to any person applying to the Judge to have any such error corrected the costs incurred by him in respect thereof and the payment of the penalty imposed by this section shall not relieve the Clerk from any additional penalty attaching to any willful and wrongful act"; *An Act To Amend And Consolidate The Law for the Sale of Fermented Or Spirituous Liquors*, 37 Vic. c.32 (1873), s.10 (clerk's penalty to be not less than \$40 and not more than \$100).

directed by statutory fiat. Historians have emphasized the importance of statistics and the fact-finding process in mid-nineteenth century state formation. By these provisions, local governments were forced to provide and pay for much of the clerical manpower required to fuel the province's economic and political agenda.

Conclusion: A Low Constitution

Many, perhaps most, major acts serve more than one purpose. One as extensive and comprehensive as the Baldwin Act should not be reduced to only one. It is not only possible, but indeed likely, that both the schools of thought outlined in Chapter 1 are correct—the act was intended to bring democracy and responsible government to the community level by extending the elective principle downwards, and it was meant to facilitate economic growth. There is plenty of evidence in the ‘must’ and ‘may’ clauses to support both arguments. The two functions may indeed be complementary. If the populace was likely to support market expansion and economic growth, the empowerment of local government would serve that end, as well as be an end in itself.

But the intention(s) of the designers are moot for the purposes of this legal historical inquiry. A principle of literary criticism for twentieth century poetry, notorious for its obscurity, is to look not at what the poet means, or, as a second level of abstraction, what the poem means, but rather what the poem *does*.²³⁸ A text-based analysis of a statute can profitably emulate this perspective. Looked at as a whole, as the sum of ‘may’ clauses, ‘must clauses’ and miscellaneous clauses, the Municipal Act can be seen as essentially constitutional.²³⁹ It was, of course, not

²³⁸ An insight (with regard to poetry) I owe to my former English professor, the late Professor Michael Lynch of St. Michael's College in the University of Toronto.

²³⁹ This is also attested to by the titles the act's later consolidations were given: instead of the Municipal Act, the Act became one concerning “Municipal Institutions.”

considered as such by contemporaries, and functioned only as a partial constitution at that, confined to the ‘low’ aspects of governance and administration.²⁴⁰ The act and its successors provided a jurisdictional framework for low governance and administration, with some prompting as to appropriate agenda, augmented by collateral legislation and tweaked by frequent amendments. It presumed interrelationships between municipalities of the same or other gradations, and between municipalities and other entities, and that there would be conflicts between them. The (subordinate) relationship of municipal corporations to the province, though fundamental, was implicit. In Chapter 8, I consider the ways municipal councils attempted to provide input into shaping the legislation which governed them, but the legislation itself allowed little leeway for creativity, and none for dialogue with or participation by local governments.

But to say that the Municipal Act approximated a low constitution is not to suggest it was basically just a template, a *tabula rasa* for municipal action. It is true that the act gave fiscal freedom to municipal councils, and for the most part suggested, rather than insisted on, matters on which property taxes could be spent. In this sense there was scope for local government agency. But there was clearly little autonomy. Even in the facilitative sections, it is evident that the options of municipal councils were legally constrained, both as to subject, and by means of internal and external conditions. The political menu was set, and especially after the deletion of the general powers clause, no ordering à la carte was to be allowed, other than by legislative amendments or special legislation. As for the mandatory clauses, the provincial priorities manifested by the Municipal Acts were no doubt associated with larger goals of economic and social development, but were in themselves rudimentary: first, honest and effective local

²⁴⁰ The province did have two formal constitutions prior to Confederation: The Act of Union (*The British North America Act*, 1840, 3 & 4 Vic. c.35) and the Constitutional Act of 1791 (officially *The Clergy Endowments (Canada) Act*, 1791, 31 Geo. 3 c.31), both acts of the British Parliament, covered most of the ‘high’ aspects of jurisdiction and governance.

administration and second, assistance in the province's information gathering process. The expenses of these were charged to the locality, and supported by civil forfeiture against the corporations and by criminal liability placed on the municipal officers and politicians personally. A further significant means of enforcement, the general mechanism of the legal system, only hinted at by the legislation, is the subject of the next chapter.

Chapter 3: Municipal Corporations in Court: Canada West/Ontario 1850-1880

The legal historian must approach research based on case reports with some trepidation. Since the advent of the ‘new’ or ‘critical’ legal history in the nineteen-eighties, such narrowly-sourced research has often been denigrated as antiquarian at best, an inaccurate and misleading formalist representation of a messy and indistinct legal reality.²⁴¹ The recognition of a need for caution in using reported cases to understand the legal past increased with the contributions to the field of the schools of legal pluralism and ‘low law,’ both of which are inherently sceptical of the concept of legal doctrine as essentially equivalent to ‘law.’

Chapters 5, 6, and 7 of this dissertation are based on archival records, which confirm that the reported cases do not comprise the totality of the experience of the municipal corporations selected for this study with the court system. The surviving minutes of the councils of the United Counties of Leeds and Grenville, the Townships of Front of Leeds and Landsdowne, Rear of Leeds and Landsdowne and Augusta, the Village of Gananoque, and the Town of Brockville all disclose myriad instances of council involvement in the lower levels of the judicial system in the County and Division Courts during the years 1850-1800. The minutes of the municipal council of the Town of Brockville also show extensive involvement of the council in a suit in the court of Chancery (in concert with several other municipal corporations) against the Brockville and Ottawa Railway, which litigation spanned several years and involved frequent trips by the Mayor to Toronto to retain and consult with equity counsel.²⁴² This chapter, on the other hand, is based on the premise that there is a place for the province-wide ‘high law’ of reported cases in the

²⁴¹ There are of course, exceptions, especially in intellectual legal history .

²⁴² The settlement of the suit was the subject of an act amending the company’s charter: *An Act to authorize the Brockville and Ottawa Railway to issue preferential mortgage debentures and for other purposes*, 37 Vic. c.40 (1874).

understanding of the legal environment of these corporations as legal actors and the evaluation of local government autonomy during this period.

While some of the cases I will discuss were leading cases, cited and followed by lawyers and judges during the period, the ‘legal archaeology method,’ focussed on one or a few such cases, is inappropriate for my purposes.²⁴³ First, as I noted in the previous chapter, municipal law in mid-nineteenth century Ontario was overwhelmingly statutory; hence many lines of judicial interpretation were highly technical, mired in procedural concerns and frequently truncated by amendments. Secondly, the course of Ontario municipal law bears out Blaine Baker’s observation that a significant disconnect in Upper Canadian legal doctrine occurred in the late nineteenth century.²⁴⁴ With the exception of a couple of decisions involving the interpretation of the British North America Act, there are no municipal cases from mid-nineteenth century Ontario with which current practitioners or academics would be even vaguely familiar.²⁴⁵ Finally, and most importantly, I am employing a non-legalistic perspective on reported cases as historical record.

What does it mean to take a non-legalistic approach to the study of cases? The conventional parameters of what I consider a legalistic caselaw-based study are those set by the original case reporters. The legalistic approach has the merit of respect for the contemporary compilers and their intended audience; what the reporters indexed as ‘municipal law’ was what

²⁴³ See Debora L. Threedy, “Legal Archaeology: Excavating Cases, Reconstructing Context,” *Tulsa Law Review* 80 (2006): 1197-238.

²⁴⁴ Baker, “The Reconstitution of Upper Canadian Legal Thought in the late-Victorian Empire,” Baker argues that the in the late nineteenth century, lawyers began to ignore Canadian or American precedent where there was a British case to the same or similar effect. Certainly, many home-grown municipal law precedents from the mid-Victorian period tended to disappear from the case reports with around the turn of the twentieth century, replaced by English cases. See the 1900 edition/revision of Harrison’s Municipal Manual, *The Municipal Manual, Part I: containing the Municipal Act, (R.S.O. c.223) and the amending acts of 1898, 1899 and 1900, viz. 61 v. c23, 62 V. 1st session, cc.2 and 5, 62 v. 2nd session, cc. 26 and 30, and 63 V. cc. 9, 33, 35, 36 and 37: with notes of cases bearing thereon*, by C.R.W. Biggar (Toronto: Carswell, 1900).

²⁴⁵ *Slavin and Orillia (Village) (Re)*, [1875] O.J. No. 7, 36 U.C.R. 159 (Ont. QB); *Leprohon v. Ottawa (City)*, [1877] O.J. No. 152, 40 U.C.R. 478 (OCA).

they and other actors within the legal system—lawyers and judges—would have considered municipal law. But I do not purport to be writing a retrospective treatise.²⁴⁶ I am indeed less interested in ‘municipal law’ per se, than in the ways that law may have affected municipal corporations as institutional, non-professional legal actors. In other words, the focus is on the parties as much as the law. There is considerable overlap, of course, and as will be seen I do rely to a great extent on legal concepts and categories, and discuss changes and trends within these.

In order to attempt to separate the legal experience of municipal actors from the reporters’ doctrinal filters I searched the LexisNexis Quicklaw digitized database of all Canada West/Ontario judgments published from 1850 to 1880 by keyword rather than by conventional legal rubrics.²⁴⁷ The search function of the database allowed me to avoid those cases which might be categorized as ‘municipal’ in the index to the reports and headnote subject-tags, but in which municipal corporations had no direct interest, and to access cases which may not have been seen by the reporter as essentially ‘municipal,’ but to which a municipal corporation was a party. Examples of excluded cases indexed as municipal are numerous contested local elections and several concerning mortmain (the municipality or one of its subsidiaries happened to be a beneficiary under a will) and ejectment (the municipality happened to be a landlord).²⁴⁸ In such cases the municipal character of the corporation was more or less incidental to the case.²⁴⁹

By using the database to search for cases with ‘city’ ‘towns,’ ‘township,’ ‘village’ and ‘county’ in the style of cause, I was able to identify reported cases in which municipal corporations as parties were directly engaged with the ‘high’ legal system during the years 1850-

²⁴⁶ In my opinion, it would be impossible to do so without a mastery of the changing structures and civil procedures of the courts during this period.

²⁴⁷ This database may be found at <http://www.lexisnexis.com/ca/legal/>.

²⁴⁸ The ‘municipal’ nature of the corporation in these cases was not considered legally significant, and did not appear to have affected the outcome in any of these.

²⁴⁹ Although not the corporate character in the case of mortmain.

1880. I do not claim that the search results are necessarily definitive or representative of the ‘high law’ of municipal corporations, but rather that they are illustrative and illuminative of the range of legal issues and problems which impacted municipal institutions and constituted their legal environment, directly or indirectly. In the first section of this chapter I discuss the utility and limitations of this data generally. I then proceed to examine three subsets of the sample that in my estimation shed light on local government autonomy during the period 1850-1880. The first group are cases dealing with the prerogative remedy of mandamus, wherein the claimant alleged a municipality was subject to judicial enforcement of legally prescribed duties on a summary process. The second group deals with judicial restrictions of local government power by means of the quashing of by-laws, another summary procedure. Reports dealing with jury trials (and appeals therefrom) concerning the imposition of liability for damage to persons and personal property arising from municipal negligence or nuisance make up the final group.

The Cases: Municipal Corporations as Litigants

While ultimately fruitful, this methodology did present some challenges. The style of cause search did not unearth every case that met the search criteria.²⁵⁰ In addition, the search resulted in a large number of false positives. Over two hundred duplicates appeared in the initial return of more than 700 hits. There were also numerous irrelevant instances in which the individual litigant’s name was “Town,” or the place name was a descriptor in the litigant name. I also excluded a number of cases in which the municipality was named as a third party but had little real interest in the cause, for instance as a garnishee or as the jurisdiction involved in an election challenge. Relevant to the legal environment, but not included in the final sample were cases in

²⁵⁰ There is at least one case that was not caught by the search because the municipal level was missing from the style of cause: *Castor v. The Corporation of Uxbridge*, [1876], 39 U.C.R. 113.

which an individual sued or was sued in his official capacity, for instance as Mayor, Treasurer, or Collector of a particular municipality, but to which the municipal corporation itself was not a party. These cases do not fit very easily into the categories used for analysis, and any bearing on the activities of the corporation would have been either minimal or indirect, although admittedly they may have contributed to the creation of a ‘chill’ among municipal counsellors or their employees.

Once purged, the sample yielded 448 discrete case reports. Some of these are reprises of the same *lis*, either because the case was sent back for a second (or third) hearing and re-appealed to the court *en banc*, or because they were re-introduced as a different cause of action.²⁵¹ Most of these are the reports of cases which either originated in the court of Queen’s Bench and the Court of Common Pleas (which had identical jurisdiction in civil matters throughout almost all this period) or progressed to the higher levels of court from a county court.²⁵² It appears that all Court of Queen’s Bench and Common Pleas *en banc* and Court of Error and Appeal decisions were reported as a matter of course.

Some cases seem to have arrived at the superior courts as a matter of first impression; however, most had progressed from a successful show cause motion by the defendant at *nisi prius* (the superior court judges on circuit for civil matters) and were thus in the nature of appeals, though not so styled. The first instance judgments on the show cause hearing seem rarely if ever to have been reported, although some of the reports include a summary of the arguments and judgment of the originating hearing as part of the report of the final disposition.

²⁵¹ *Lis* is a legal term referring to a discrete dispute; *en banc* refers to the court hearing a case as a group, as opposed to a single judge.

²⁵² See Banks, “Evolution of the Ontario Courts,” for a detailed exposition of the court structure during this period. For the evolution of the appeals process, see Christopher Moore, *The Court of Appeal for Ontario: Defining the Right of Appeal, 1792-2013* (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 2014).

Twelve reports are from the Court of Chancery, twelve from interim motions in Practice Court/Chambers and twenty-six from the Court of Error and Appeal/Court of Appeal. No cases involving municipal corporations as parties were appealed to the Supreme Court of Canada (in existence only in the last five years covered by this study). Only one was appealed to the Judicial Committee of the Privy Council.²⁵³

The first thing to be noted about the reported cases involving a municipal corporation as a party is how few they are. There is no reason to doubt R.C.B. Risk's calculation that cases indexed as 'municipal law' made up the fifth largest group of reported cases in the union period.²⁵⁴ Nevertheless, 448 reported cases in which a municipal corporation was a party over thirty years is not sufficient to brand municipalities as a group as especially litigious. This finding is all the more marked by the fact that in 373 of the cases, a municipality was the defendant. (This number includes twenty-eight in which municipalities were being sued by other municipalities.) So the cases in which municipalities initiated a suit which came to be reported at the superior level numbered only seventy-five. Of these seventy-five, nineteen were launched by municipalities against Railway companies, and another seven against other commercial corporations such as waterworks, canal and road companies.

²⁵³ The appeal to the Judicial Committee of the Privy Council was not included in the statistical sample since it was not reported in the Upper Canada Reports, although its iterations in the Court of Chancery and Court of Error and Appeal are included: *Hamilton and Milton Road Company v. The Corporation of the Town of Dundas* (1873) U.K.P.C. 16, appeal from an Order of the Court of Error and Appeal of Ontario in Canada, dated 7 September 1870, varying a Decree of the Court of Chancery for the Province of Ontario, dated 26 January 1870.

²⁵⁴ Risk, "The Law and the Economy in Mid-Nineteenth-Century Ontario," 88-131, 92. Risk states that the five largest groups of cases were internal management of the works of the courts (i.e. civil and criminal procedure, broadly defined), property, the market, enforcement of claims against debtors, and municipal institutions (including "elections and the power of municipalities"). In my selection, election cases are excluded, but some of the cases categorized by Risk as having to do with property, the market, procedure and debts would be included.

TABLE 1: CASES IN WHICH A MUNICIPAL CORPORATION WAS A PARTY

	75
Municipality is plaintiff	
Municipality is defendant	373
Total	448

TABLE 2: DEFENDANTS IN CASES IN WHICH MUNICIPAL CORPORATIONS WERE PLAINTIFFS

Other municipal corporations	28
Railway corporations	19
Other commercial corporations	7
Non-corporate defendants	21
Total	75

Of the 373 cases in which the municipality defended, only twenty-three were at the suit of commercial corporations or non-municipal institutions.²⁵⁵ The reasons for this discrepancy could be many, but we can speculate that municipalities rarely felt the need to assert themselves to the degree of litigating or appealing (without resorting to settlement) at the superior court level except where the opponent was of a similar or greater economic power or standing. Cities were parties in ninety-three reported cases, counties in 137, towns in eighty-seven, villages in twenty-six, and townships in 111.²⁵⁶ Cities and towns were consequently considerably over-represented.

²⁵⁵ Including the Law Society of Upper Canada, suing for an overpayment of property tax: *The Law Society of Upper Canada v. The Corporation of the City of Toronto*, [1866] O.J. No. 58, 25 U.C.R. 199.

²⁵⁶ Note that the total is different from the number of cases in which municipalities were litigants because there were multiple municipalities in several cases, as co-plaintiffs and defendants, or as both plaintiff and defendant.

Within these categories as well there were significant differences: for instance, the metropolis, Toronto, was a party in fifty-four cases, whereas Kingston, which also had city status for the entirety of the period, was a party in only fourteen. Non-municipal opponents were varied. Those who repeated as parties appeared in insufficient numbers to form a significant pattern, although the number of cases involving railways is worth noting. Nine railway companies were opposing parties: of these, the most frequently appearing was the Great Western Railway, with nine appearances. The causes of action in these cases ranged from issues of contract formation to specific performance (to build a station) to injury to property. The lion's share—still a mere five—dealt with property tax assessment.²⁵⁷

Among the municipalities which were part of, or were located within, the United Counties of Leeds and Grenville (the corporation of the united counties itself, one town, Brockville, which withdrew from the united counties in 1858, two villages which attained corporate status during this period, Gananoque and Prescott, and thirteen townships/united townships), only a few appear as parties to litigation in the published reports. The United Counties of Leeds and Grenville and one of its constituent townships, Augusta, were opposing parties in two iterations of the same case (one a procedural motion), which arose from an application for mandamus by the township concerning a road the township council alleged the county council had a legal duty to construct.²⁵⁸ This case, *In re The Municipality of The Township of Augusta and The Municipal Council of The United Counties of Leeds and Grenville*, demonstrates the ways in which the 'high' legal record could reflect political and practical

²⁵⁷ See Chapter 7 on the sometimes colourable attempts of municipal corporations to collect as much revenue as possible from railway companies.

²⁵⁸ *In re The Municipality of The Township of Augusta and The Municipal Council of the United Counties of Leeds and Grenville*, [1854] O.J. No. 98, 12 U.C.R. 522.

conflicts, but is also a cautionary illustration of the inter-corporation conflicts which complicate any inference of judicial respect or disrespect for local government autonomy.

In this instance, the county council had passed a by-law in 1850 to macadamize or otherwise improve a road, to be paid for partly (it was hoped) by tolls. In 1853, the county reneged on the project. Only after the reeve of Augusta had raised the issue several times with his colleagues on the county council to no avail did he turn to the law. It was clear to the judges that Augusta was in the right, but they were stymied by the institutional character of the parties.²⁵⁹ Although they did not elaborate, their unease seems to have related to concern about the applicability of a remedy which had been traditionally personal, to force a particular officer to do his duty—and hence enforceable against an identifiable and punishable human being—to a corporation, and not about the ramifications for the principles of local democracy. In the end, they decided on a mandamus *nisi* to allow a more thorough consideration at a later date, and the matter was eventually resolved out of court.²⁶⁰

The reports include only two cases involving urban municipal corporations within Leeds and Grenville. The Town of Brockville was sued by the town's school board when the former tried to evade payment of the entire amount mandated by statute on a technicality.²⁶¹ The village of Gananoque was the loser in an application to quash a by-law by reason of a clerk's error in publishing the necessary advertisements preliminary to the prerequisite plebiscite for a temperance by-law.²⁶² Aside from Augusta, the only Leeds and Grenville Township represented

²⁵⁹ *In re The Municipality of The Township of Augusta and The Municipal Council of The United Counties of Leeds and Grenville*, [1854] O.J. No. 98, 12 U.C.R. 522 (UCCB), para. 9.

²⁶⁰ The records of the two corporations do not give any direct information as to the agreement, but as the road was eventually macadamized, it would appear that the move to the law assisted the township's position, although of course it may be that the counties' council's position changed for other reasons.

²⁶¹ *The Board of School Trustees of the Town of Brockville v. The Town Council of Brockville*, [1851] O.J. No. 122, 9 U.C.R. 302 (UCQB).

²⁶² *Brophy and Gananoque (Village)*, [1876] O.J. No. 193, 26 U.C.C.P. 290.

in the reports was the Front of Leeds and Lansdowne, which appears courtesy of the suit of a ratepayer, one Mr. Richmond. Richmond successfully challenged a by-law by which the township council attempted to impose a dog tax solely on the inhabitants of the (at that time unincorporated) village of Gananoque. Legally speaking the village was an undifferentiated part of the township, and while Chief Justice Robinson saw no reason why a council should not be able to customize its by-laws for urban areas, the by-law fell afoul of the statutory prohibition on asymmetric taxation.²⁶³

Enforcement of Legal Duty: Mandamus Cases

The inconclusive character of win/lose statistics is clearly borne out by the cases in which municipal corporations faced a legal challenge to their freedom of action by means of the prerogative writ of mandamus.²⁶⁴ During the period under review there were thirty reported cases involving a writ of mandamus brought against a municipality. In seventeen of these the municipality fended off the challenge. In two there was a mixed result; in the *Augusta Township* case, discussed above, because the case was both brought and defended by a municipal corporation, and in the other because there were two matters on which a mandamus was sought; one was granted while the other was refused. In three others a mandamus *nisi* was ordered with costs reserved. In other words, applicants had a less than 50% success rate. But the odds were not

²⁶³ *In re Richmond v. The Municipality of the Township of the Front of Leeds and Lansdowne*, [1851] O.J. No. 49, 8 U.C.R. 567. In its submission the township tried to make use of the early general ‘peace, welfare and good government’ catchall provision for townships, which was to disappear from the statute book shortly thereafter.

²⁶⁴ For the development of the writ see Edith G. Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (Cambridge, Mass: Harvard University Press, 1963); D. C. Yardley, “The Purpose of Mandamus in English law,” *Juridical Review* 4 (1959): 1-6.

in their favour from the outset. The writ had been developed by decades of judicial interpreters to be difficult to obtain, a principle the Upper Canadian bench showed little interest in altering.²⁶⁵

For an application to be successful, a three-part test was to be met: a 'clear' demand, a 'clear,' statutorily imposed duty, and a 'clear' failure to comply.²⁶⁶ These requirements allowed some room for judicial discretion, but tended to be strictly construed, especially at the beginning of the period. In these years superior court judges rarely gave the moving party the benefit of the doubt, even where it was clear that its position was correct on the merits. Later, their successors relaxed these conditions somewhat, allowing demands that had been posed to the council, rather than to the clerk, in contravention of the strict terms of the statute, or that could be cured by the excision of an incorrect part of the demand. Other glosses on the prerequisites were added during the period, and in 1875 the legislature moved to codify the procedure, specifically giving statutory approbation to a further condition which had been argued from time to time, namely the absence of an alternative remedy in law or equity.²⁶⁷

In pronouncing their decisions, judges occasionally gave as their rationale for the strictness with which they applied the tests the fact that mandamus was a summary procedure, which required only the filing of affidavits.²⁶⁸ Judges seem to have preferred the comfort of live

²⁶⁵ For the attitudes of union era judges toward precedent and principle, see Risk, "The Law and the Economy in Mid-Nineteenth-Century Ontario," 93.

²⁶⁶ "Remedy by mandamus...goes only when the defendant is clearly competent to do of his own accord and without a command what it would be the object of the writ to compel him to do, and when it is clear also that it is his duty by law to do the act, and that he has been in due manner called upon, and yet has refused": *In re William Dickson and the Municipal Council of the Village of Galt*, [1852] O.J. No. 8510 U.C.R. 395 (UCQB), para. 10, per Robinson, C.J.

²⁶⁷ The interaction of the law of mandamus with the precepts of equity and common law was canvassed by a number of judges: *In re Stratford and Huron Railway Company and the Corporation of the County of Perth*, [1876] O.J. No. 338, 38 U.C.R. 112 (OCA), wherein one of the issues was whether there were alternative remedies available, and whether the plaintiffs were required to avail themselves of these regardless of cost and convenience.

²⁶⁸ *In re Stratford and Huron Railway Company and the Corporation of the County of Perth*, [1876] O.J. No. 338, 38 U.C.R. 112 (OCA), para. 78. Later in the period *viva voce* evidence was permitted by examination of the parties on their affidavits.

witnesses and juries provided by the standard processes of civil action.²⁶⁹ In a number of cases the judges announced that the appropriate remedy to enforce a municipal duty was by indictment (a quasi-criminal remedy received from English law and enshrined in the municipal acts of the period), and expressed annoyance that initiating parties preferred to proceed by mandamus. Though the application does not appear to have been inexpensive in absolute terms, the initiating parties appear to have preferred the procedure as relatively so, and also for its relative speediness.²⁷⁰ In *R. v. Haldimand County*, for instance, the village council of Cayuga had opted for a mandamus application (via the crown as nominal moving party) instead of choosing indictment “or some other mode” of resolution to dispute the liability of county council for road repair “avowedly on the ground of being more speedy;” the court elected to punish them “for having chosen to try an experimental action” by ordering costs against them.²⁷¹ Even in many of the cases that the municipality ‘won,’ it is clear that the victory would be fleeting, as the bench made it clear that the challenger was in the right as to his (or its, in the common event of inter-institutional contests) interpretation of the law, even if a mandamus absolute could not be granted on the facts before the court. Either a mandamus *nisi* was granted, or it was made clear

²⁶⁹ See *In re Stratford and Huron Railway Company and the Corporation of the County of Perth*, [1876] O.J. No. 338, 38 U.C.R. 112 (OCA).

²⁷⁰ In *Thurston and Verulam (Township) (Re)*, [1876] O.J. No. 93, 25 U.C.C.P. 593 (UCCP), Wilson J. was unmoved by the applicant’s argument that a by-law opening a road which made his ingress and egress to his residence difficult and dangerous due to stumps and deviations should be quashed, and suggested that the parties should put the dispute into a “proper form for trial” by way of mandamus, but reflected that “....the expense of such a procedure, which would have to include a surveyor’s report, would be out of all proportion to the sum of money which would, even in the applicant’s estimation, be required to make the [substituted] road sufficient for his use.” (para. 22). Note the preamble of *The Prerogative Writ of Mandamus Act*, of a few years earlier (1872) which refers to delays in obtaining mandamus leading to injustice: 35 Vic. c.14.

²⁷¹ *R. v. Haldimand County*, [1861] O.J. No. 113, 20 U.C.R. 574 (UCQB). Sometimes parties (or their advocates) seem to have opted for greater expense than the court considered appropriate: costs were also reduced when a successful municipality indulged in “an extravagant exuberance of....useless affidavits: IN *THE MATTER OF The Public School Trustees of Section No. 6 in The Township of South Fredericksburgh in The County of Lennox and Addington, and The Corporation of The Township of South Fredericksburgh*, [1876] O.J. No. 43, 37 U.C.R. 534, (Ont. QB), paras. 17 and 18, per Hagarty, C.J.C.P.

that a second attempt which rectified previous errors in the form of the demand, for example, would be successful.²⁷²

The courts commonly gave thinly veiled advice to unsuccessful applicants. In *Port Hope School Board v. Port Hope (Town)* for example, Macaulay J. decided in favour of the municipality:

In exercising the large powers vested in the Board of Trustees when a direct taxation to so large an amount to be imposed upon the inhabitants, not by the Board directly, but through the Municipal Council upon their requisition, we must see that the terms and substance of what the statutes and the law required have been correctly complied with....

Nevertheless, he pointedly added that there was no doubt that “if properly made, it is the duty of the Municipal Council to provide the moneys in the manner desired, and that if refused, a mandamus may be moved.”²⁷³

The second reason for looking behind win/loss statistics is that the outcome of the writ might have significant repercussions irrespective of a legal victory or defeat. In the aforementioned *Augusta Township* case, as well as many others, it is apparent that interpretation of the law and the affirmation of the duty was not the sole objective of both or either parties. One particularly clear example of an application with political ramifications was *Upper Canada v. Bruce (County)* wherein a legal demand for a large sum for new public buildings arose out of a more general dispute over the selection of a county town on the separation of the counties of Huron and Bruce.²⁷⁴ Chief Justice Draper confessed himself to be particularly troubled that the application was at the initiation of “a private individual merely in his capacity of a resident

²⁷² In the case of a mandamus *nisi*, the order was a provisional one: *nisi* (unless) meant that the municipality was given the opportunity to show cause why the order should not be made permanent.

²⁷³ *Port Hope School Board v. Port Hope (Town)*, [1854] O.J. No. 170, 4 U.C.C.P. 418.

²⁷⁴ *The Municipal Council of Bruce*, [1861] O.J. No. 227, [1861] O.J. No. 227 (UCCP).

ratepayer in Walkerton, and consequently interested in the selection of that village as the county seat.”²⁷⁵

On occasion, there are hints that the writ may have been resorted to as a reference, agreed on by the parties in a genuine attempt to settle the legal obligations of the parties which were legitimately obscure.²⁷⁶ In an early contest between the Port Hope School Board and the Town of Port Hope, the Court of Common Pleas awarded no costs to the successful party (the town) when the board overstepped its jurisdiction by ordering the council to hand over a stated sum immediately, without providing an opportunity to view the estimates and decide on the best means of satisfying the demand.²⁷⁷ Often it is apparent that the council’s decision to refuse the request at issue had not been a unanimous one, and it may well have been that the courts were used either to prevent an impasse or to allow one side to gain advantage. In many of the cases it is obvious that the duty involved a significant charge on the public purse, resulting in understandable vexation of municipal politicians that they were being forced to pay for decisions with which they might or might not agree but regarding which they had no right even to consult, and for which they might be politically accountable.

There are signs that judges chafed at the idea that the parties were attempting to use the procedure—and in effect the judges themselves—to avoid sticky political problems, in effect passing the buck of unpopularity to those who were not vulnerable to electoral chastisement. In *Dickson (estate) v. Galt (village)*, Chief Justice Robinson made this irritation explicit. After stating the conclusion that the case was not an appropriate one for the issuance of a mandamus

²⁷⁵ *The Municipal Council of Bruce*, [1861] O.J. No. 227, [1861] O.J. No. 227 (UCCP), para. 17.

²⁷⁶ One of the few municipal law cases from this period to still be cited in Canadian courts, *Leprohon* was a stated case, brought to determine the rights of the province vis à vis the dominion. In this case, the municipality, whose rights to tax a ratepayer who was a dominion employee was at issue, seems superfluous to the arguments: *Leprohon v. Ottawa (City)*, [1877] O.J. No. 152, 40 U.C.R. 478 (OCA).

²⁷⁷ *Port Hope School Board v. Port Hope (Town)* [1854] O.J. No. 170, 4 U.C.C.P. 418.

order, Robinson went on to proclaim *obiter* his reluctance to use the opportunity to help councillors interpret the legislative scheme:

It was rather pressed upon us [that]....it might be extremely useful, if we were to express our opinion on the soundness or unsoundness of the principle on which the Court of Revision under the assessment law acted.....Upon consideration, we feel it is more proper to forbear....It is a question of which the legislature has not made us the judges, either in the first instance or by way of appeal...and where we have not the authority to control, we think we ought not to throw out opinions from that which has been generally acted upon, and might unsettle what has been hitherto acquiesced in, and lead to much public inconvenience. We are restrained too from giving an extra-judicial opinion in this matter by another consideration. The question of what is the proper principle of valuation is one extremely general in its application; it affects the pecuniary interests of almost everyone, not excepting the judges themselves....²⁷⁸

The *Dickson* case was one of the few in which the applicant was an individual; in most of the mandamus cases the dispute was inter-corporate or at least inter-institutional. Thirteen of the cases arose from conflicts between the two lowest units of governance—municipal corporations and school boards. Two cases arose at the complaint of a county registrar, a low law functionary not responsible to council, but whose needs, like those of the school boards, the councils were obliged to meet; the records of the United Counties of Leeds and Grenville indicate continuing friction on this account.²⁷⁹ A couple of mandamus cases arose from disagreements between municipalities, usually to determine which of them would bear the expense of a road or bridge.

In *Re Augusta (Township) v. Leeds and Grenville (United Counties)*, referred to above, Chief Justice Robinson expressed his disinclination to rule against a local government, even in

²⁷⁸ *In re William Dickson and the Municipal Council of the Village of Galt*, [1852] O.J. No. 8510 U.C.R. 395 (UCQB).

²⁷⁹ *Upper Canada v. Northumberland and Durham (United Counties)*, [1860] O.J. No. 250, 10 U.C.C.P. 526 (UCCP). Wrote Chief Justice Draper: “I cannot understand why so much irrelevant matter has been introduced into [the argument]. The court have only to deal with the legal question, and the return should have been confined to that, The duty of building fire-proof offices and vaults does not depend upon their approval by the council of there being a new registry office, or of the place selected for it.” (para. 24). The legal squabble over financial responsibility for the registry offices continued, resulting in another judgment two years later: *Ward v. Northumberland and Durham (United Counties)*, [1862], O.J. No. 104, 12 U.C.C.P. 54. The council lost the second round as well.

the cause of another. The implied conflict between political considerations arising out of changed circumstances and arbitrary legal rules is made clear in his judgment:

We do not at present see that there is not a duty plainly incumbent on the united counties....to make the road they are desired to make. It may be that by reason of there having been a railway lately constructed in that section of the county the prospect of a remunerating revenue from such a road may have become impaired; but that has not been set up as a reason, nor could, as we supposed, be accepted as a valid one. Neither is it shown that for want of funds, or the legal authority to raise them, a compliance with the statute is impossible.

If the defendants should appear to be without any legal excuse... then the case would be one of a duty imposed by act of Parliament remaining unperformed. And if there should appear to be nothing unreasonable in insisting upon performance, why should it not be enforced?

It could only be on account of some difficulty in extending the remedy by mandamus to a municipal body, and in rendering it effectual. At present we do not see that there is such difficulty when there appears to be no other remedy. But we think it clearly proper that we should award only a mandamus nisi at present, in order that any question of law or fact that may be raised upon the return may be disposed of formally....²⁸⁰

Municipalities and their challengers were undeterred by this judicial spinelessness and continued to seek resolution of their conflicts in court. Robinson was soon impelled to stray from the disinterest he articulated in *Dickson*, and his successors showed a greater acceptance of the role of advisor, at least to the extent of providing statutory interpretation.

One reason why the superior courts may have been moved to begin to provide helpful hints in the form of dicta was that they could not help but observe that frequently the relevant statutes were confusing in their construction and contradictory in their application. Exasperation with poor legislative drafting was often expressly stated; Chief Justice (and municipal law expert) Robert Harrison being especially prone to *ex cathedra* denunciations of “careless”

²⁸⁰ *Augusta (Township) and Leeds and Grenville (United Counties) (Re)*, [1854] O.J. No. 98, 12 U.C.R. 522, (UCQB), para. 9.

statutes resulting in “needless” suits.²⁸¹ The various school acts in particular were found to be frustrating for boards, councils and courts alike because of their inconsistent regulations, a problem which persisted throughout the period. To take just one example, one set of rules and procedure for making demands of councils was provided for grammar schools and a divergent set for elementary schools.²⁸² The messy interface between the boards’ rights to funding and the municipalities’ rights to control their budgets was complicated by the reality that both were institutions of low governance blessed with the legitimacy of democratic election. Though judges did usually hold school boards to a high standard of proper process, they ultimately sided with the trustees, in deference to the will of the legislature, but also in recognition that stable funding for education and the role of the latter in provincial progress had as much value as the right of democratically elected councils to control tax revenue. Stated Chief Justice Robinson: “The interests of the common schools are too important in a large city to admit of a sudden suspension of their proceedings, from any dispute between the two authorities, if it can possibly be avoided. It would produce the utmost inconvenience.”²⁸³ One concession to local autonomy and the democratic principle was allowed in the courts’ refusal to allow school boards to dictate the manner in which their requests would be fulfilled. As long as the funds were forthcoming, the

²⁸¹ For instance, in *Niagara High School Board v. Niagara (Township)*, [1876] O.J. No. 132, 39 U.C.R. 362, (Ont.QB): “It is to be regretted that the Legislature has not in each section used precisely the same words to denote precisely the same thing. We do not, however, look upon the difference in language as indicating anything more than the carelessness of the framers of the Act. But we regret to say that the carelessness of the framers of the Act is still more obvious the further we proceed in the reading of the Act.” (paras. 44, 45, 46).

²⁸² This was especially confusing in the case where single board managed both school levels. See *Perth Board of Education v. Perth (Town)*, [1876] O.J. No. 102, 39 U.C.R. 34 (Ont.QB). Once he had disentangled the statutes, Chief Justice Harrison ordered a mandamus *nisi* in this case “...in the hope that the parties will come to an understanding which will meet the demand of the joint board without being oppressive to the ratepayers...” He added the warning that “... if not, that the legal questions involved may be formally raised by demurrer or plea and in the event of the joint board being ultimately successful, a peremptory writ shall be issued, which the council must obey under pain of attachment.” (para. 81)

²⁸³ *Toronto School Board v. Toronto (City)*, [1860-1869] O.J. No. 151, 20 U.C.R. 302, 2 Chy. Chrs. 304.

courts refused to permit school trustees to force a recalcitrant council to issue debentures or institute a dedicated rate.²⁸⁴

Restrictions on Power: Quashing By-laws

The corporate form chosen by the legislature for local governance meant that municipal councils were in law merely agents of the municipal corporation, and could act only by resolution or by-laws.²⁸⁵ The courts made it clear early in the period that a resolution was insufficient to exercise the powers granted by the legislature, though if the legislation specifically allowed for a resolution (as, for example in choosing a county seat), or if there was a statutory duty to act, a resolution would suffice.²⁸⁶ Summary jurisdiction was given to the superior courts by s.163 of the Municipal Act (1849) to quash municipal by-laws for illegality. Again, we cannot speculate too much on the number of cases as indicative of the likelihood that a corporation might face a quashing application. Without a doubt most by-laws passed into law uneventfully. However, it is clear that the danger of a challenge was present until the deadline, after the legislature restricted the time for bringing such applications.²⁸⁷

The legitimacy of the of the courts' right to quash as granted by the statute was such that even the competing ideal of local democracy could not compete. As Chief Justice Harrison noted in *Baird v. Alamonte (Village)*, the quashing procedure guaranteed that the rights of the individual could not be extinguished, no matter how overwhelming the support for the by-law in

²⁸⁴ *Port Hope School Board v. Port Hope (Town)*, [1854] O.J. No. 170, 4 U.C.C.P. 418 (UCCP).

²⁸⁵ Per Burns J. in *Municipality of East Nissouri v. Horseman*, [1858] 16 U.C.R. 583: "The members or councillors composing the council are not the corporation; they are the agents of the corporation for the management of the affairs and funds of the corporation." This leading Ontario case was cited in a number of American works, including John Forest Dillon's treatise, *Commentaries on the Law of Municipal Corporations*, (3rd ed.) vol. 1 (Boston: Little Brown and Co.) 260, 902.

²⁸⁶ *U.C. v. Bruce (County)*, [1861] O.J. No. 227, 11 U.C.C.P. 57; *Croft v. Peterborough (Town)*, [1855] O.J. No. 102, 5 U.C.C.P. 35 (UCCP).

²⁸⁷ See Chapter 2.

council, or even by the ratification of the electors, “....so long as there remained a single dissatisfied rate-payer, his right to invoke the aid of the Courts for the carrying out of the law is not to be lost because the majority of the rate-payers is disposed to acquiesce in a breach of the law.”²⁸⁸ The determination of such ‘dissatisfied rate-payers’ was responsible for eighty-five applications to quash that resulted in reported judgments during this period. These provide abundant examples of the range and character of activities which could bring a council to court to defend itself, and the willingness of the courts, within the limits they felt were set out by the statutes, to indulge challenges to municipal authority.

The first thing to be noted in reviewing the quashing cases is how few manifest any *bona fide* desire by local governments to truly extend their autonomy. Not surprisingly, many cases quashed for extra-jurisdictional experimentation involved obvious self-interest on the part of the council members. Judges had little sympathy for councillors who put their own interests ahead of those of the ratepayers by straightforwardly voting themselves salaries in clear contravention of the statute, or by more roundabout methods, such as covering the expenses of a colleague’s (unsuccessful) election challenge defence or attempting to interpret the rights of county councillors to travel expenses liberally.²⁸⁹ Reimbursement for actual travel was permitted; the court refused to extend this statutory indulgence to expenses of accommodation. Similarly, the attempt of one town to vote an honorarium to a long-serving mayor on his retirement was quashed as *ultra vires* the corporation.²⁹⁰ *Per diems* were allowed, but allowances were not, and the council was not allowed to do indirectly what it could not do directly. Still, there are hints

²⁸⁸ *Baird and Almonte (Village) (Re)*, [1877] O.J. No. 108, 41 U.C.R. 415 (Ont.QB), para. 86.

²⁸⁹ See *In re Wright and the Municipal Council of the Township of Cornwall*, [1852] O.J. No. 100, 9 U.C.R. 442 (no right to pass by-law remunerating council members); *In re Henry Bell v. The Municipality of the Township of Manvers*, [1853] O.J. No. 210, 3 U.C.C.P 400 (no right to indemnify a candidate for costs of a contested election challenge; *Patterson and Grey (County)*, [1859] O.J. No. 55, 18 U.C.R. 189 (UCQB) (no right to pass by-law re reimbursement of travel expenses).

²⁹⁰ *McLean v. Cornwall (Town)*, [1871] O.J. No. 60, 31 U.C.R. 314 (Ont.QB).

that this action might not have attracted the ire of one or more ratepayers, and the disapproval of the court, had it not been so “extravagant and unreasonable, and out of all proportion to the revenue of the town:” taxes for the year were \$3324, the rejected honorarium \$1600.²⁹¹

But reported cases resulting from attempts to increase the number or categories of powers allowed to municipal councils, whether made in good faith or bad, were few. In *Bell v. Manvers (Township)* [no.2,] the same council that had attempted to indemnify a losing candidate for his election challenge was (successfully) attacked by the same ratepayer for an attempt to change the qualification of voters.²⁹² The accommodating dicta of Chief Justice Robinson in *Richmond* to the effect that townships should be allowed to legislate asymmetrically under the residual good government power did not herald an era of liberal interpretation of this section.²⁹³ The chief justice began the trend to restrictive interpretation himself when he refused to allow delegation of corporate responsibility over roads to commissioners in another early case..²⁹⁴

One case that did show a municipality’s interest in exercising the general power in order to legislate for a unique problem was *Davis v. Clifton (Town)*.²⁹⁵ The town council of Clifton (now Niagara Falls) sought to use the clause to justify a by-law prohibiting “persons calling themselves runners” from soliciting visitors and acting as guides within the limits of the town.²⁹⁶ Chief Justice Draper, while expressing sympathy with the council’s “good sense and practical experience,” in dealing with this somewhat *sui generis* urban problem, found that the “general

²⁹¹ *McLean v. Cornwall (Town)*, [1871] O.J. No. 60, 31 U.C.R. 314, (Ont.QB), para. 25.

²⁹² *In re Henry Bell v. The Municipality of the Township of Manvers*, [1853] O.J. No. 209, 3 U.C.C.P. 399 (UCQB). I have added the “no.2” in the text above: the original reports did not distinguish the identical styles of cause of the two discrete proceedings.

²⁹³ See Chapter 2 regarding the repeal of the municipal PWGG clause. Note, however, that the Temperance Act (1864), 27 & 28 Vic. c.18, included a general power to regulate and govern.

²⁹⁴ *In re W.S. Conger and Peterboro' Municipal Council*, [1851] O.J. No. 16, 8 U.C.R. 349 (UCQB). See also *The Canada Company v. The Municipal Council of the County of Middlesex*, [1852] O.J. No. 13, 10 U.C.R. 93 (UCCB) (council cannot delegate the calculation of a sum to be raised by a by-law to the clerk *ex post facto*).

²⁹⁵ *Re Davis v. Municipality of Clifton*, [1858] O.J. No. 265, 8 U.C.C.P. 236 (UCCP).

²⁹⁶ Presumably this was enacted in good faith. But since local innkeepers were exempted, it may be that one or more individuals from this profession was on or connected to council and sought to reduce competition.

power to make by-laws for the peace, welfare, and good government of a town” could not extend to the “absolute prohibition of any occupation, not in itself unlawful, and only a nuisance from its abuse.”²⁹⁷ The general power itself was dropped from the act shortly thereafter, and judges continued to refuse to read in powers for municipalities to regulate either occupations or categories of trade.²⁹⁸ On several occasions the court suggested remedial legislation as the solution, and in one case it appears that the remedial act was actually passed before the quashing application reached the Queen’s Bench.²⁹⁹ The by-law to provide for ‘coloured’ school sections attacked in *Simmons v. Chatham* was quashed, sadly not as against public policy, but because its operation was by definition uncertain.³⁰⁰ The education and municipal acts were conceptually

²⁹⁷ *Re Davis v. Municipality of Clifton*, [1858] O.J. No. 265, 8 U.C.C.P. 236 (UCCP), para. 6.

²⁹⁸ *IN THE MATTER OF Hagaman and Chisholm, and the Corporation of the Town of Owen Sound*, [1861] O.J. No. 114, 20 U.C.R. 583 (UCQB) by-law authorised individuals to erect wharves; and also to remunerate themselves by charging tolls on goods, part of which were directed to be paid to the treasurer of the municipality); *Farquhar et al. v. The Corporation of the City of Toronto*, [1860] O.J. No. 217, 10 U.C.C.P. 379 (UCCP) (act did not authorise the imposition of a tax per cord upon wood brought into town and not placed in the public wood market for sale); *In re Campbell and the Corporation of the City of Kingston*, [1864] O.J. No. 169, 14 U.C.C.P. 285 (UCCP) (quashed a “by-law which imposed tonnage dues on scows, craft, rafts, railway cars, etc. coming into the city... containing firewood to be exposed or offered for sale or marketed for consumption within the city); *IN THE MATTER OF Charles Fennell and The Corporation of the Town of Guelph*, [1865] 24 U.C.R. 238 (UCQB) (by-law, whereby “no person should expose for sale any meat, fish, poultry, eggs, butter, cheese, grain, hay, straw, cordwood, shingles, lumber, flour, wool, meal, vegetables, or fruit (except wild fruit), hides or skins, within the town, at any place but the public market, without having, first paid the market fee thereon, as therein provided, except all hides and skins from animals slaughtered by the licensed butchers of the corporation holding stalls in the market,” (quashed); *Kinghorn and Kingston (City)*, [1866] O.J. No. 24, 26 U.C.R. 130 (UCQB) (by-law prohibiting any person bringing produce, articles, commodities or things to a city market, from selling or offering the same for sale within the city limits, on their way to market, or without having paid market toll, and before offering such things for sale in the market (quashed); *Re McLean and The Corporation of The Town of St. Catharines*, [1868] O.J. No. 86, 27 U.C.R. 603 (UCQB) (by-law enacted that no butcher, huckster, or runner, should buy or contract for any kind of fresh meat, provisions, &c, such as were usually sold in the market, on the roads, streets, or any place within the town, or within one mile distant therefrom, between certain hours in the day, quashed as act restricted to butchers living within one mile of town); *Snell and Belleville (Town)*, [1870] O.J. No. 44, 30 U.C.R. 81 (UCQB) per Wilson J: “The power to prevent or regulate the buying and selling of articles exposed for sale or marketed is more extensive than the Legislature could probably have intended to give, and would, if literally exercised, cover almost any enactment.” (para. 31).

²⁹⁹ *IN THE MATTER OF Hagaman and Chisholm, and the Corporation of the Town of Owen Sound*, [1861] O.J. No. 114, 20 U.C.R. 583 (UCQB). The court took note that the remedial legislation had been passed, but proceeded with the judgment in any event. The judges declined to explain, but presumably the action continued so a costs order could be made, and the court and/or parties could avail themselves of an opportunity to interpret the statute for future guidance.

³⁰⁰ *Simmons v. Chatham (Township)*, [1861] O.J. No. 17, 21 U.C.R. 75 (UCQB). See Robin W. Winks, *The Blacks in Canada: A History*, 2nd ed. (Montreal; Kingston: McGill-Queen's University Press, 1997), 373-75.

based in property not persons; whether or not permitted by statute, any attempt to regulate using personal attributes as a proscribed class could not help but be problematic for the drafter.³⁰¹

Another initiative, an attempt by a municipal council to vote a bonus in the form of exemption from taxation to ‘new’ manufacturing, was quashed as a prohibition on trade (that is, an infringement of the rights of rival manufacturers).³⁰² Concerns for prohibition of trade and the creation of monopolies were also the deciding factor in several cases involving by-laws restricting the number of taverns permitted in a jurisdiction to none or one. Although professing inability to go beyond the statutes in many other situations, the judges had no qualms invoking the common law to restrict the powers of municipal councils bent on ensuring temperance by means of restricting supply (and more importantly, suppliers). In these cases, the liberal virtue of freedom of commerce trumped all else, including the court’s evident agreement with the council’s temperance goals.

Chief Justice Harrison, proclaiming the principle that “there must not be any unnecessary interference with trade” cited only American cases in support.³⁰³ Indeed, Harrison was masterful in professing to follow Upper Canadian cases, while drawing on American precedent to suppress local government autonomy. For instance, in the case involving the restriction of liquor shop licences, *In re Thomas Brodie and the Corporation of the Town of Bowmanville*, Harrison cited the dicta of Chief Justice Robinson in a similar case, *Barclay v. Darlington*, to the effect that judges are the stand-ins for the legislature in controlling the actions of municipal councils, which duties must be exercised responsibly, but then segued into a far stronger expression of the court’s

³⁰¹ Mariana Valverde makes this point in *Everyday Law on the Street: City Governance in an Age of Diversity* (Chicago: University of Chicago Press, 2013), 26.

³⁰² *Pirie and Dundas (Town)*, [1869] O.J. No. 48, 29 U.C.R. 401 (UCQB).

³⁰³ *In re Thomas Brodie and the Corporation of the Town of Bowmanville*, [1876] O.J. No. 366, 38 U.C.R. 580 (Ont.QB), para.12.

right to supervise than anything Robinson or his peers ever claimed.³⁰⁴ Again citing American precedent, Harrison left no doubt as to his lack of respect for the inherent legitimacy of local democratic governance, opining that

[a] superintending power of a judicial character is necessary to be exercised in order to keep municipal bodies within legal and reasonable limits in the exercise of the powers delegated to them by the Legislature.... [M]unicipal powers are not only limited, but must be reasonably exercised and not only strictly within the limits conferred by the Legislature, but in perfect subordination to the law of the land.³⁰⁵

Somewhat unconvincingly, he pre-emptively countered any suspicion that this was due to any self-aggrandizing impulse on the part of the bench, thereby implicitly reinforcing the subtext that municipal councils could not be trusted: “It is a description of control from which any Court to whom it is committed would rather be relieved.”³⁰⁶

Many cases in which by-laws were called into question were more prosaic, and revolved on form as much, or more than substance. While the earlier court of Robinson and his colleagues was not interested in ‘reading in’ powers or giving them expansive meaning, they were remarkably sanguine about those ‘errors on face of the by-law’ which seemed to be *bona fide* mistakes, rather than devious or self-interested power grabs. One reason given for this leniency was the lack of legal sophistication of many of the rural councils. Judges were also conscious of the labyrinthine character of the intersecting statutes which governed municipalities, especially in regard to raising money by taxation or debentures. In one early case, *Grierson v. Ontario*

³⁰⁴ *In re Thomas Brodie and the Corporation of the Town of Bowmanville*, [1876] O.J. No. 366, 38 U.C.R. 580 (Ont.QB); *Barclay v. Darlington (Township)(Re)*, [1876] O.J. No. 366, 38 U.C.R. 580 (Ont.QB).

³⁰⁵ *In re Thomas Brodie and the Corporation of the Town of Bowmanville*, [1876] O.J. No. 366, 38 U.C.R. 580 (Ont.QB); *Barclay v. Darlington (Township)(Re)*, [1876] O.J. No. 366, 38 U.C.R. 580 (Ont.QB), paras. 8, 11.

³⁰⁶ *In re Thomas Brodie and the Corporation of the Town of Bowmanville*, [1876] O.J. No. 366, 38 U.C.R. 580 (Ont.QB); *Barclay v. Darlington (Township)(Re)*, [1876] O.J. No. 366, 38 U.C.R. 580 (Ont.QB), para. 9.

(County), Robinson C.J. listed twenty-nine discrete sections and schedules found in seven acts that were relevant to a by-law imposing a county rate.³⁰⁷

Certainty was required where property was affected, as in expropriation cases, wherein the court insisted on clear metes and bounds description of the road to be laid out or altered as well as its course.³⁰⁸ Reference to collateral documents would not be allowed in this context. With regard to taxation by-laws, however, the courts tended to give the by-law the benefit of the doubt, assuming a second by-law could cure any confusion created by imperfect wording. However, they were also careful to remind councils that a by-law, even if allowed to stand, could still be called into question when enforced against an individual or other institution, exposing the corporation to civil liability.

Concerning the express statutory requirement that a by-law must be under seal, the absence of which might have been expected to be an unforgiveable error, the courts gave municipalities the benefit of the doubt by allowing an imperfect format, subject again to warnings about the potential consequences of acting under an illegally constituted power. The motivation in these cases seems to have been practicality and a desire to keep local government functioning. Several cases mentioned concerns that by-laws that had been acted on could not be allowed to fail merely because the seal or the appropriate signature was missing. Funds derived from an ineptly drafted rate, for example, could hardly be easily reimbursed by the municipality; the embryonic bureaucracies and their pen and ink record keeping would have been severely challenged by such a finding. The conclusion that judges were bending over backwards to support the council as proxy for the public, especially in its taxpaying capacity, is supported by the fact that judges showed much less compunction in contract cases, often siding with the

³⁰⁷ *Grierson v. Ontario (County)*, [1852] O.J. No. 139, 9 U.C.R. 623 (UCQB).

³⁰⁸ See for example, *Brown v. York (County)*, [1851] O.J. No. 60, 8 U.C.R. 596 (UCQB).

incompetent clerk or deceitful council against the honest party attempting to recoup for services or goods tendered. Though exceptions were carved out over the period for contracts where the goods or service had been accepted, contracts within the power of corporations, part of their 'ordinary expenditure' or concerning which they had a duty to perform, at the end of the period municipalities were still pleading restrictive English case law, often disingenuously, to avoid paying contractors with whom they were dissatisfied. In 1877, Justice Wilson explained this judicial pro-municipal bias:

A municipal body is, by law, protected from many claims for which a private person would be liable and it is right for the sake of those whom the councils of such bodies represent that it should be so, otherwise the ratepayers would be exposed to many unreasonable and extortionate demands.³⁰⁹

Possibly due to the courts' willingness to overlook them, or the gradual improvement of drafting practices and use of professional drafters, challenges to by-laws on account of defects of form lessened throughout the period.³¹⁰ What remained constant were challenges that sought to introduce so-called 'extraneous matters,' such as pre-requisites of ratepayer petitions, newspaper notifications, council quorums and votes, and ratification or initiation procedures which failed in varying respects to meet the criteria mandated by statute, as grounds to strike down a by-law. None of these met the test of appearance on the face of the record, and thus were not appropriate issues for an application for summary judgment. But as much as they paid lip service to this self-denying doctrine, the judges of Canada West and then Ontario found themselves unable to avoid

³⁰⁹ *Gibson v. Ottawa (City)*, [1877] O.J. No. 61, 42 U.C.R.172 (Ont.QB), para. 33. The courts were even stricter when contracts were entered into when the council had not passed a by-law, or did not have power to so contract. Judges put contractors on strict notice that it was up to them to determine whether the council had power to enter into the transaction, without regard for the fact that if that was often difficult for the council, it would be doubly so for the party seeking to do business. For judicial treatment of contracts not under seal for corporations generally, see Risk, "The Nineteenth Century Foundations of the Business Corporation in Ontario," 284.

³¹⁰ For the development of drafting of zoning by-laws in nineteenth-century Toronto, see Raphaël Fischler, "Development Controls in Toronto in the Nineteenth Century," *Urban History Review / Revue d'Histoire Urbaine* 36, no. 1 (2007): 16-31.

dealing with these questions. The alternative, to wait until the illegality of a by-law was raised in a civil or quasi-criminal proceeding at some possibly distant and certainly unforeseeable point in the future, thereby throwing the operation of municipal affairs and local law into doubt and confusion, undermining the legitimacy of prosecutions, tax collection, destabilizing debentures and municipal creditors, was not an attractive prospect.

The first reported case to address the problem of raising the corporate veil in regard to a by-law after the passage of the Baldwin Act was *In re Hill and Walsingham (Township)*. The point was not necessary to the outcome, but the court pondered the arguments which had been raised by the applicant:

Whether we ought not merely to hold a by-law void when brought before us in support of any act done under it, by reason of its having been in some measure irregularly passed; but also to entertain a motion on such a ground for setting it aside, is a question of much importance. If we should feel it incumbent upon us in any case to interfere, it would not be.... under the.... statute...but on the general principles of the common law, that it is necessary to the validity of a by-law that the mode of passing it prescribed by its charter should be strictly pursued....³¹¹

The next year Chief Justice Robinson set out the rule in *Grierson v. Ontario (County)* that the court was only “bound” to quash by-laws appearing illegal on their face, but it was discretionary on them under the common law to quash where illegality was proved by extraneous evidence.³¹² Once again diffident about creating such a significant precedent, he allowed that “[he] would have taken more time to make up [his mind] upon this application, if [he] were not apprehensive that considerable public inconvenience might arise from the county being kept long in suspense.”³¹³

³¹¹ *Hill and Walsingham (Township) (Re)*, [1851] O.J. No. 126, 9 U.C.R. 310 (UCQB), per Robinson C.J., para. 7.

³¹² *Grierson v. Ontario (County)*, [1852] O.J. No. 139, 9 U.C.R. 623 (UCQB).

³¹³ *Ibid*, per Robinson C.J., para 12.

Grierson became the leading case in challenges to by-laws based on defects of their passing. The courts did use their discretion by examining, often in detail, what had gone on behind the record. When the deficient procedures were not taken in bad faith (good faith being presumed in the absence of evidence to the contrary) and no-one was deprived of opportunities to oppose the by-law by reason of inadequate notices, by-laws arising from unorthodox processes were generally allowed to stand. This laissez-faire attitude was not conducive to legal certainty and the ability of solicitors to properly advise councillors, but judges were increasingly comfortable with the practice. As Mr. Justice Gwynne put it “these [are the] days...of amendment of mere formal and technical irregularities.”³¹⁴

The legislature was seemingly unfazed by councils ignoring procedural strictures with the blessing of the courts, and indeed introduced a weak privative clause into the Temperance Act of 1864. By section 37, the act decreed that by-laws made under the statute should not be quashed for reasons of defects in form or procedure.³¹⁵ In spite of his earlier preference for certainty, as a judge Harrison was fervent in his dislike of legislative attempts at curtailing judicial discretion, and hence judicial power. The saving clause in the Temperance Act barely gave him pause. In *Re Malone v. Grey (County)*, he refused to strike down a temperance act by-law for the early closing of a poll where it did not appear to have affected the result of the mandated plebiscite, but expressed a “doubt” that several previous cases dealing with the section had given “full effect” to it. “It is possible,” he warned, “that the decisions under the statute may be distinguished as to avoid any actual inconsistency between them, but...it is not necessary to make the attempt to reconcile them.”³¹⁶

³¹⁴ *Brophy and Gananoque (Village)*, [1876] O.J. No. 193, 26 U.C.C.P. 290 (UCCP), para.10.

³¹⁵ Temperance Act, 1864, 27 & 28 Vic. c.18, s.37.

³¹⁶ *Malone and Grey (County) (Re)*, [1877] O.J. No. 82, 41 U.C.R. 159 (Ont.QB).

Several months later, in *Re Mace and Frontenac (County)*, Chief Justice Harrison found no such saving grace in an illegally passed by-law, even for the admirable purpose of “repression of these evils.”³¹⁷ The fact that the by-law included a penalty (a fine, with imprisonment on default), with no right of certiorari or appeal (provided the conviction had been made by a stipendiary magistrate, recorder, justice of the peace, sheriff, or police magistrate) was for him the deciding factor, and he found it was the court’s duty to quash. He distinguished the precedents and invoked “the natural liberty of the subject” to trump the social goal of temperance.³¹⁸ Questioning what appeared to him to be a tendency to uncritical judicial acceptance of municipal errors, the Chief Justice pondered whether there could be any justification:

It is illegal.... But it is argued that it ought not to be quashed, because its quashing would unsettle the new state of things created by the by-law. This argument, if admitted, would render it needless to quash any by-law, however oppressive, or prevent the amendment of any law, however vexatious. It was an argument to which, obviously, little effect was given when the by-law was supposed to have been carried, and is entitled to as little consideration now as then. Cases where, after the money authorized to be raised by a by-law has been expended, and the municipality has obtained the benefit of the expenditure, and the by-law itself has become effete, afford no analogy for the decision of this case.³¹⁹

The privative clause, he ruled, had no effect because the by-law was a void proceeding. And as far as the option of waiting to strike it down when challenged after enforcement was concerned, that alternative was merely a waste of time. As he put it in another by-law case, *Re Revell and Oxford (County)*, “the sooner [the void by-law] is out of the way the better for all, except those interested in the maintenance of imposture.”³²⁰

³¹⁷ *Mace and Frontenac (County) (Re)*, [1877] O.J. No. 54, 42 U.C.R. 70 (Ont.QB). Harrison was joined in the decision by Wilson and Armour JJ., though less zealously: per Wilson, J. “I rather concur with than dissent from the judgment just pronounced.” (para. 121).

³¹⁸ *Mace and Frontenac (County) (Re)*, [1877] O.J. No. 54, 42 U.C.R. 70 (Ont.QB) para. 95.

³¹⁹ *Mace and Frontenac (County) (Re)*, [1877] O.J. No. 54, 42 U.C.R. 70 (Ont.QB) para. 106.

³²⁰ *Revell and Oxford (County) (Re)*, [1877] O.J. No. 79, 42 U.C.R. 337 (Ont.QB).

Liability: Cases of Nuisance and Negligence Resulting in Personal Injury

The Municipal Act of 1849 preserved the English quasi-criminal remedy of indictment of a body entrusted with road maintenance for the misdemeanour of non-repair, and I have already referred to the mention of this remedy by several judges as a (preferable) alternative to a mandamus application.³²¹ Although there are only a couple of reported cases arising directly from an indictment, it seems to have been a healthy remedy during the period.³²² There were significant distinctions between the English law on the subject and Upper Canadian statutes. First, while English law allowed courts to fine the responsible road commissioners or members of a corporation or parish as individuals for their neglect of roads, the Municipal Act provided only that the corporation should be fined, with the payment to come out of the general funds.³²³

Another significant deviation from the English system was the addition of a civil remedy (with the first amendment to the act), which permitted an individual to sue the corporation for damages caused by failure to maintain roads or bridges.³²⁴ During the period 1850-1880, nineteen reported judgments (including two appeals of previously reported cases) dealt with

³²¹ An instance of legal inertia: the influence of the indictment tradition on the procedure of at least the earlier cases is manifest by the plea of not guilty, or not guilty per statute, which was appropriate to a quasi-criminal proceeding, but not a purely civil one. See, for example, *McCarthy v. Oshawa (Village)*, [1860], [1860-1869] O.J. No. 27, 19 U.C.R. 245, 2 Chy. Chrs. 41 (UCQB).

³²² *R. v. Haldimand (County)*, [1861] O.J. No. 113, 20 U.C.R. 574, moved back to Queen's Bench by way of certiorari after an unsuccessful mandamus application. The standard of repair that would lead to a successful indictment was also at issue in contract disputes between municipalities and the road companies who contracted to build or maintain roads in exchange for the right to exact tolls, revealed in the archival records to have been a common practice.

³²³ The English law of indictment for non-repair is discussed in several case reports, including *Colbeck v. Brantford (Township)*, [1861] O.J. No. 53, 21 U.C.R. 276 (UCQB) paras. 9, 11. See also Beatrice and Sidney Webb, *Statutory Authorities for Special Purposes: With a Summary of the Development of Local Government Structure*, (London: F. Cass, 1963).

³²⁴ In *Heart Versus Head: Judge-Made Law in 19th Century America* (North Carolina Press, 1997) Peter Karsten argues that statutes opened the door to findings of negligence against municipal corporations in England, and then also in North America. See also James Muir "Instrumentalism and the Law of Injuries in Nineteenth Century Nova Scotia" in *From Imperial Bastion to Provincial Oracle: The Supreme Court of Nova Scotia, 1754-2004* ed. Philip Girard and Jim Phillips (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 2004), 361-391, 373.

municipal liability for injury to persons arising from negligence (and nuisance), fewer than the number of reported mandamus cases and much fewer than the number of quashing cases. The cases of municipal liability for damages to persons are also much less evenly distributed across the years than the mandamus and quashing cases. There are no reported cases on the liability of municipal corporations for damages to persons at all during the 1850s. Possibly due to reforms to the court system and rules of civil procedure, three cases appeared during the 1860s, and the remainder during the 1870s.³²⁵

Reported cases regarding municipal liability for personal injury, relatively few within the overall set as they may be, were clearly considered legally significant, as evidenced by the generally greater number of separate written opinions within the judgments, together with the copious amount of research manifest by these; one judge alluded to the ‘exhaustive’ 124 paragraph opinion of his colleague.³²⁶ Moreover, damages awarded by juries against municipal corporations for negligence resulting in personal injury could be sizeable, in the thousands of dollars.³²⁷ With so much money at stake, it is no wonder that parties were still willing to appeal and occasionally re-appeal to have these judgments sent back for re-trial.

Not surprisingly, the earliest cases decided under the act examined the legal bases for of this new type of civil action at length. *Colbeck and Wife v. The Corporation of the Town of*

³²⁵ It does appear, however, that there were contract cases involving the standards of upkeep required of road companies which included as a factor the responsibility of municipalities civilly and by indictment.

³²⁶ *Toms v. Whitby (Township)*, [1874] O.J. No. 58, 35 U.C.R. 195 (Ont.QB) per Richards, C.J., para. 172. The opinion of Wilson J. was 124 paragraphs. That of Chief Justice Richards, partly concurring, was about half that length.

³²⁷ The highest amount at issue in the personal injury cases was \$4000.00, awarded by a jury in *Toms v. Whitby (Township)*, [1874] O.J. No. 58, 35 U.C.R. 195 (Ont.QB). It was agreed by the judges that this was too high. Awards of damages to property cases, of which there were eleven during this period, were much lower. The award of \$325.00 against the City of Toronto in nuisance/negligence for damages to a house from a backed-up drain, the installation of which by the corporation’s contractors was mandated by by-law, was considered reasonable by the Court of Queen’s Bench in 1861: *Reeves v. Toronto (City)*, [1861] O.J. No. 32, 21 U.C.R. 157. Damages to real property arising from common law nuisance claims tended to be in the hundreds of dollars. For the conflation of nuisance and negligence in Ontario law see Michael A. Jones, "The Historical Development of Tortious Liability for Public Nuisance" (LLM thesis, Osgoode Hall Law School, York University, 1980).

Brantford, decided in 1861, focused on the statutory nature of the remedy. The defendants attempted to use English common law to excuse the evidently poor state of the road in question, arguing that they were exempt from liability because they had appointed an overseer and passed a by-law. Chief Justice Robinson was unswayed; these defences would be fine, he agreed, if only there were not a statute to the contrary. In addition, he remarked, “[i]f the fact of the township having passed proper by-laws, and appointed overseers, would exempt them from liability, the traveller would, in many cases, perhaps in most, fail to receive the redress.”³²⁸

This emphasis on the statutory foundation of the claim was a constant theme throughout the cases. The object of the relevant clauses was identified in *Castor v. The Corporation of Uxbridge* as the protection of the populace, and the concomitant rule of statutory interpretation applied: “We should...give to the Act such, fair, large and liberal construction as will best ensure the attainment of the object.”³²⁹ The fact that statutory powers were given to municipalities to maintain streets and sidewalks was considered a relevant factor in determining duty in several cases, *Ringland v. Toronto* (discussed below) to the contrary being an exception.³³⁰ The statute-given ability to raise money from the public to carry out repairs was also adverted to in *Colbeck* to counter the English common law defence of insufficient funds. The inclusion in the statute of the power of municipalities to legislate to protect travellers from pits and precipices was given as another such clue as to legislative purpose, called “a special ground of obligation and responsibility.”³³¹

³²⁸ *Colbeck v. Brantford (Township)*, [1861] O.J. No. 53, 21 U.C.R. 276 (UCQB), para. 11.

³²⁹ *Castor v. The Corporation of Uxbridge*, [1876], 39 U.C.R. 113, para. 47.

³³⁰ *Ringland v. Toronto (City)*, [1873] O.J. No. 100, 23 U.C.C.P. 93 (Ont.CP).

³³¹ *Toms v. Whitby (Township)*, [1874] O.J. No. 58, 35 U.C.R. 195. The case turned on the question of adequate fencing.

While the common law could not be employed to *excuse* a municipal corporation, it was held in *Harrold v. Simcoe County* that it could be employed to *augment* liability. The defendant corporations in *Harrold* tried to rely on the absence of counties from the statutory list of levels of municipal corporations impressed with a duty of road repair to no avail; road maintenance, the court ruled, was mandated by statute and also by common law.³³² This is not to say that common law defences and factors could never be used in the corporations' favour. The law around the concept of notice could be and was used in defence of neglectful municipalities. For example, in *Ayre v. The Corporation of Toronto* the court found that the city was not liable for the damage caused by rubbish piled in the street on a particular occasion due to lack of notice, even though there was evidence the council had previously sanctioned the general practice.³³³

Also useful to municipal defendants were the inter-related (and conflated) concepts of proximate cause and contributory negligence.³³⁴ That the damage complained of must have been 'caused' by the defendant's neglect was at the heart of the claim. In the first few cases neither proximate cause nor contributory negligence is mentioned explicitly. Causation in regard to the plaintiff's actions, rather than the defendant's neglect, was key: for example, did the plaintiff take a shortcut over a ditch on a plank he had placed there instead of walking around the obstacle? Where the plaintiff had actual notice of a hazard and failed to take a path to safety, the

³³² *Harrold v. Simcoe (County)*, [1865] O.J. No. 120, 16 U.C.C.P. 43 (UCCP).

³³³ *Ayre v. The Corporation of The City of Toronto*, [1879] O.J. No. 285, 30 U.C.C.P. 225.

³³⁴ Note that the concept of proximate cause was not used in the contemporary sense of remoteness. Rather, the proximate cause was the factual cause. In his history of the development of tort law in the United States, Edward White refers to this as the 'legal' cause. Unfortunately, his discussion of causation pre-*Palgraf* is somewhat sparse: G. Edward White, *Tort Law in America: an Intellectual History* (Oxford; New York: Oxford University Press, 2003), 314-17. James Muir finds that because it was a complete defense to negligence, contributory negligence was a "potent defence" for the city of Halifax in nineteenth century personal injury suits, but that the doctrine offered "little protection from subsequent suits;" Muir, "Instrumentalism and the Law of Injuries in Nineteenth Century Nova Scotia," 377.

courts felt this, as much as the hazard, had ‘caused’ the mishap, whether the street was in repair or not.³³⁵

The first mention of ‘proximate cause’ comes in 1874 in *Toms v. Whitby*.³³⁶ Mr. Justice Wilson, in the lengthy opinion referred to above, struggled with the problem of choosing whether the reason that the horse and carriage carrying Mrs. Toms and her son ended up in the river was that the horse was frightened, or that there was no fence to stop the fall (a combination of the two factors was not contemplated). After a review of seemingly every Canadian, British and American authority on the point, he concluded in favour of the ‘New Hampshire’ rule, which held that where there were two or more necessary but not sufficient causes for an accident, the cause attributable to some sort of wrong doing should be found to be the proximate cause of the injury. Since two juries had absolved the wife and son of poor driving, Wilson J. found the lack of a fence was to blame, seemingly by a rationale of *res ipsa loquitur*.³³⁷ Chief Justice Richards concurred, but Mr. Justice Morrison described himself as doubtful, preferring the rule followed in the State of Maine to the effect that the corporation should not be liable if another cause could possibly have been to blame, but not so much as to register a dissent.

The Maine rule was nevertheless followed in a case decided in the same year, *Hutton v. Windsor (Town)*. Mr. Hutton, a feeble elderly man, had (it was presumed) tripped on a board and been killed by a fall into a ditch. The court felt that since the deceased had had the opportunity to see the obstruction earlier in the day, it could not be said he was not partly culpable, and ordered that the case be sent back to the jury to determine if he had contributed at all to the fall by his negligence, in which case his estate’s claim should fail. The defendants

³³⁵ *McCarthy v. Oshawa (Village)*, [1860], [1860-1869] O.J. No. 27, 19 U.C.R. 245, 2 Chy. Chrs. 41 (UCQB); *Ringland v. Toronto (City)*, [1873] O.J. No. 100, 23 U.C.C.P. 93 (Ont.CP).

³³⁶ *Toms v. Whitby (Township)*, [1874] O.J. No. 58, 35 U.C.R. 195 (Ont.QB).

³³⁷ *Ibid.*

appealed to the Court of Appeal, which upheld the trial judgment.³³⁸ The next few cases skirted the issue, merely declaring that the issues of ‘contributory negligence’ of the plaintiff and the connection between the alleged default and the accident were both questions for the jury.

The conflict between the two schools of thought was supposedly resolved by Chief Justice Harrison in favour of the New Hampshire rule in *Sherwood v. Hamilton* in 1875. Although Harrison confessed that he personally preferred the Maine rule, which he had championed as counsel for the corporation in *Toms*, he considered himself bound by the Court of Appeal’s acceptance of the reasoning of the lower court. Nevertheless, the supposed triumph of the New Hampshire rule did not spell the end of the use of contributory negligence as a successful answer to a presumptive finding of negligence. In 1878, Harrison re-visited the rule from a different angle, ruling that plaintiff had the burden of proving that the accident—a slip on another icy sidewalk—was the ‘sole cause’ of her fall and that it could not have been avoided by greater attention on her part, since she had knowledge of the iciness.³³⁹

Concepts of proximate cause and contributory negligence were clearly attractive to a series of judges who were able to use them to rule against plaintiffs if they thought these were unworthy of rate-payer funded largesse, while still issuing dicta holding municipalities to a high standard of maintenance. The rhetoric concerning the standard of repair expected, though often not the deciding factor in the outcome of the claims, was a clear communication of the judge’s view of appropriate municipal obligation. It was a standard that can be seen to rise over time, despite the shortness of the period and the relative paucity of cases.

³³⁸ *Samuel Toms and Elizabeth Toms, his wife, plaintiffs in the Court below, respondents v The Corporation of The Township of Whitby, defendants in the Court below, appellants*, [1875] O.J. No. 53, 37 U.C.R. 100, (Ont. E & A).

³³⁹ *Burns v. Toronto*, [1878] O.J. No. 143, 42 U.C.R. 560 (Ont. High Ct).

At first the courts relied on a standard of repair that could theoretically give rise to an indictment. This was made explicit in *Ringland v. Toronto (City)*. Mr. Justice Gwynne discussed the law of various jurisdictions, focussing especially on the “states of the American Union,” which he explained were “more in point than any English case can be in a case of this nature, by reason of the similarity of our Acts and the climate...”³⁴⁰ The principle as set out in cases from Maine was adopted as it “seems to us reasonable, namely that such a state of repair as would exempt the City from liability on an indictment will also exempt them from liability in a civil action.”³⁴¹ The standard of repair likely to exempt a municipality from indictment was never given more definition than the term itself, but it can be assumed it was not a high one.

The next year, *Toms* began a series of arguments which sought to raise the threshold of non-actionable repair: “it is reasonable the public should be protected from all danger on the highways, if possible...but at any rate from all danger that is very great.”³⁴² Later, while still professing to follow *Ringland*, judges continued to erode the test until finally Chief Justice Harrison in *Burns v. Toronto* reduced it to the narrow holding (with which he agreed) that “a mere presence of ice” did not equal negligence. The Chief Justice went on to distinguish an older case involving a road company wherein Chief Justice Robinson said that it was not negligent to leave snow on a macadamized road. Arguing that the statutory language had changed since both these cases had been decided, and citing a string of exclusively American decisions, Harrison declared that if *Ringland* stood for the proposition that indictable neglect was the test of appropriate repair then he would “respectfully dissent.”³⁴³ His *Burns* test prescribed a level of extreme care: “If the highway be from any cause, whether of nature or man, in view of the

³⁴⁰ *Ringland v. Toronto (City)*, [1873] O.J. No. 100, 23 U.C.C.P. 93 (Ont.CP), para. 22.

³⁴¹ *Ibid.*

³⁴² *Toms v. Whitby (Township)*, [1874] O.J. No. 58, 35 U.C.R. 195, para. 73.

³⁴³ *Burns v. Toronto*, [1878] O.J. No. 143, 42 U.C.R. 560 (Ont. High Ct.), paras. 58, 60.

season, situation and other attendant circumstances, in such a condition that it cannot be pronounced reasonably safe and convenient, it may be said to be out of repair.”³⁴⁴ Two components of this definition are noteworthy: first, as had been more or less explicit in earlier cases, the standard was to be understood in context, and second, what had been more implicit, that nuisance rather than just negligence was to be included.

A couple of cases of nuisance as a ground of non-repair had already made their way to the superior courts with differing results. In *Castor*, the presence of contributory negligence by the plaintiff negated what would otherwise have been responsibility of the township for telegraph poles left at the side of the road (by a third party) that had disturbed a horse.³⁴⁵ In *Rounds v. Stratford*, a wagon (perhaps including a red board or perhaps not) that had been left in the road for a month was presumed to have frightened a horse, causing a spill and injury.³⁴⁶ In the latter case, the issue of causation was fatal to the plaintiff’s case when the court saw no connection between the length of time the wagon had been allowed to remain there and the horse’s reaction.³⁴⁷ In neither case did the court claim that liability could not be based in nuisance in a proper case. In 1876, overhanging trees were accepted as a hazard equivalent to non-repair without much comment.³⁴⁸

Clearly the standard of road repair municipalities were expected to provide was rising. But the *Burns* test also allowed for mitigating circumstances. Judges had been careful from the outset to stipulate that the level of acceptable repair was to be relative to the geographic,

³⁴⁴ Ibid, para. 31.

³⁴⁵ *Castor v. The Corporation of the Township of Uxbridge*, [1876] O.J. No. 107, 39 U.C.R. 113.

³⁴⁶ *Rounds v. Stratford*, 19 U.C.R. 245, 2 Chy. Chrs. 41 (UCQB). The red board was considered a significant factor as one of the reasons a horse might be spooked.

³⁴⁷ *McCarthy v. Oshawa (Village)*, [1860], [1860-1869] O.J. No. 27 (UCQB); *Rounds v. Stratford*, 19 U.C.R. 245, 2 Chy. Chrs. 41 (UCQB). The judge also wondered how the horse would manage in a city, with colours of all kinds and consulate flags flapping.

³⁴⁸ *Gilchrist v. Corporation of Carden*, [1876] O.J. No. 161 (UCCP).

economic, climatic and demographic context. Hence the long-established roads of populated districts were presumed to be of better quality than rural tracks used mostly by sleighs in winter. The wealth of the community was therefore a relevant factor, but it was one which could serve both sides. In *Boyle v. Dundas*, the judge expressed great sympathy for a town of 4,000 residents, with taxes assessed at \$11,000.00, of which more than half was spent on streets and sidewalks, faced with a jury award for damages totalling over \$900.00.³⁴⁹ Although the legislation did not provide a ceiling, Chief Justice Hagarty observed that practically speaking, the power to assess was not unlimited, and such an award was “wholly disproportioned to their means and resources.”³⁵⁰

Severe, changeable weather and the freeze-thaw cycle were considered especially relevant to sidewalk cases, including *Boyle*. However, the situational excuses available to rural roads were not extended to urban sidewalks. For some reason, judges seemed to feel all sidewalks in a particular urban place had to meet the same (lowest) level of repair. Unsurprisingly given this mindset, they did not find for the plaintiff in any reported sidewalk negligence case during this period. Sidewalks, they implied, were, if not a luxury, at least a comfort, and councils were to be thanked for their efforts rather than harassed about their failings. In the countryside, council-built drains were similarly to be appreciated, not condemned:

The outcry is not that the drains are not fenced, but that the roads are not drained.... If all the ditches in the county, and every county are to be guarded because an accident may happen....it would impose upon the municipalities an intolerable burden, the performance of an almost impossible burden, and the fences put up....would be a nuisance worse than the ditch itself.³⁵¹

³⁴⁹ *Boyle v. Dundas (Town)*, [1875] O.J. No. 140, 25 U.C.C.P. 420, (Ont. CP), para.15.

³⁵⁰ *Ibid*, para. 63.

³⁵¹ *Walton v. The Corporation of The County of York*, [1879] O.J. No. 284, 30 U.C.C.P. 217 (Ont. CP), paras. 27, 28.

Conclusion

Judges were highly conscious of the reception their judgments would receive from municipal councillors, whom they contemplated would be paying attention. In *McCarthy v. Oshawa*, Chief Justice Robinson proclaimed that “[w]e should be making a decision which would take all municipalities, both in town and country, by surprise, if we held that the defendants were chargeable with the accident which the plaintiff unfortunately met with.”³⁵² The County of York, defendant in this case, would no doubt have been relieved that the jury award of \$400.00 in the case was overthrown by an order of non-suit; whether they were heartened by the sympathetic words that accompanied the order seems likely as well.

In Chapter 4 I look at the ways the law—both statute and case law—was communicated to the councils of Canada West/Ontario by municipal law manuals and other publications. Assuming councillors were aware of the cases reviewed here, what would have been the general messages received? Probably the most important was that all their activities could be monitored. The legislation by which they were established as “creatures of statute,” in conjunction with the received forms of the common law, included a number of ways rate-payers and other parties could invoke the power of the courts to scrutinize and pronounce on the legality of their deeds and their omissions. They could be forced to act (and, more importantly, spend considerable amounts of money) by an order of mandamus. Their legislation could be quashed, or at least judicially questioned, at the complaint of any dissatisfied ratepayer. If a horse was particularly sensitive or steps were slapdash, they might be sued by a resident or passerby who might be richly compensated by a sympathetic jury. Of course, if they could show they had acted in good

³⁵² *McCarthy v. Oshawa (Village)*, [1860-1869] O.J. No. 27, 19 U.C.R. 245, 2 Chy. Chrs. 41 (UCQB), para. 14.

faith, a court might well be predisposed to aid them, or the ratepayers they represented; I have noted the ways the court could manipulate the outcome it thought most appropriate in these scenarios. But the discretion that the judges jealously guarded and indeed occasionally worked to expand could be just as easily used to the corporations' favour as to their detriment. Robert Harrison's lawyerly conviction that councils and their lawyers might prefer to encounter more clarity and certainty, and less equity and discretion from their judicial overseers as well as from legislative overlords, may well have been correct.

For the historian, the cases as a whole and the three subsets lead to the same conclusion. Judicial oversight was random and rare, but was always a possibility. Judges might commiserate with councils over the challenges posed by complicated statutes, demanding school boards, and frightened horses, but they maintained their suspicions of incorrect expropriations, sharp practice in by-law voting, and conflicts of interest. The mandamus, quashing and liability cases are all evidence that W. Thomas Matthews' contention that the ballot box was the only real check on municipal power in this period is overstated.³⁵³ We can also infer that although preservation of power and the tax base were priorities, increasing municipal power (as opposed to personal political power) was not a goal for municipal councils at this time, or that if it was, it was not generally expressed by testing the law in ways that would attract the attention of ratepayers and the censure of high court judges.

Throughout the cases surveyed here, municipal corporations and their councils are implicitly defensive even when not explicitly so. The law they encountered, part of the legal system which created them and in which they operated, required them to know their place. The reported cases are evidence that while municipal councils did generally accept the system and

³⁵³ Matthews, "By and For the Large Propertied Interests," 380-1.

their place in it, they were also ready to exploit it, if not for autonomy vis à vis the province, then for the enhancement of their agency to achieve short term legal goals of victory in court, as well as the longer term extra-legal objectives which may have brought them there.

Chapter 4: Municipal Law Books: The Legal Environment for Municipal Corporations in Canada West/Ontario, 1850-1880

Just as they have concentrated on state ‘high’ law, so legal historians have generally restricted their discussion of legal publishing to ‘high’ publications aimed at judges and lawyers. In spite of the burgeoning ‘history of the law book’ field, there has been little research on the history of legal publications geared to laymen.³⁵⁴ This has had a restrictive effect on our knowledge of the legal culture of the non-lawyer. As Robert C. Berring and his successors have persuasively argued, the legal environment, the “world of thinkable thoughts” is constituted by the various means of communicating legal information which the thoughts and their thinkers produced and by which they were reproduced.³⁵⁵

In this chapter I argue that municipal law books contributed to the creation of a discrete legal environment for municipal councillors and their clerks in mid-Victorian Ontario. These

³⁵⁴ See A.W.B. Simpson, “The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature,” *University of Chicago Law Review* 48, no. 3: 632-79. See also the essays in Angela Fernandez, Markus Dirk Dubber, and Philip Girard, eds., *Law Books in Action: Essays on the Anglo-American Legal Treatise* (Oxford; Portland, Or.: Hart, 2012). Justice of the Peace Manuals, which have received a fair amount of attention, occupy a middle ground between treatise and layman’s law publication: JPs, usually laymen, were clearly part of the judicial system. For the history of JP manuals in Canada see Jim Phillips, “A Low Law Counter Treatise? ‘Absentees’ to ‘Wreck’ in British North America’s First Justice of the Peace Manual,” in *Law Books in Action* ed. Angela Fernandez et al., 202-19. Coroners were similarly situated between the lay and the legal professional: see Myles Leslie, “Reforming the Coroner: Death Investigation Manuals in Ontario, 1863-1894,” *Ontario History* 100, no. 2 (2008): 221-38. See also John A. Conley, “Doing it by the Book: Justice of the Peace Manuals and English Law in Eighteenth Century America,” *The Journal of Legal History* 6, no. 3 (1985), 257-98; Larry M. Boyer, “The Justice of the Peace in England and America from 1506 to 1776: A Bibliographic History,” *Quarterly Journal of the Library of Congress* 34 no.4 (1977): 315-26; Norma Landau, *The Justices Of The Peace, 1679-1760* (Berkeley: University of California Press, 1984), especially 334-43. On the beginnings of the business press generally, see John J. McCusker, “The Demise of Distance: The Business Press and the Origins of the Information Revolution in the Early Modern Atlantic World,” *American Historical Review* 110, no. 2 (2005): 295-321.

³⁵⁵ Robert C. Berring, “Legal Research and The World of Thinkable Thoughts,” *Journal of Appellate Practice and Process* 2, no. 2 (2000): 305-18; Richard A. Danner, “Legal Information and the Development of American Law: Writings on the Form and Structure of the Published Law” *Law Library Journal* 99 no. 3 (2007): 193-227; Richard A. Danner, “Influences of the Digest Classification System: What Can We Know?” *Legal Reference Services Quarterly* 33, no. 2-3 (2014): 117-36.

publications, which depended for their success on an actual or anticipated market of lay customers, are the best source for determining what the latter could reasonably be assumed to want to know: as book historian Robert Darnton has argued, "...the reader influences the author both before and after the act of composition."³⁵⁶ I am not concerned with what a lawyer or judge would have said the municipal law was at this time, but rather how the official sources of law were re-constituted by commercial legal publications designed for a suddenly numerous group of potential customers of the law that defined the scope of their activities and jurisdiction, indeed, their figurative existence.

In addition, these publications may be considered evidence of what the purchaser would consider constituted the *scope* of relevant law, once the investment had been made. But the legal environment is more than the sum of selected law or laws. As well as what publishers and editors thought their potential purchasers wanted to know, these communications include a normative dimension, as they indicate what the authors thought their audience *should* know, think, and perhaps ultimately do.³⁵⁷ The municipal legal environment created by the reconstitution of positive municipal law by commercial media was indeterminate, varying with the author, the format and the date of publication, but, I argue, increasingly legalistic and prescriptive.

Some formats of publications for the municipal market emerged as more successful than others. Even as publishers adapted to the market, the market itself changed. The model for successful municipal law publishing began to favour the legal over the lay author, and the specific over the general presentation. In the process, municipal actors were colonized as

³⁵⁶ Robert Darnton, "What Is the History of Books?" in *Books and Society in History: Papers of the Association of College and Research Libraries Rare Books and Manuscripts Preconference*, ed. Kenneth E. Carpenter (New York: R. R. Bowker, 1983), 3-26; see also Liora Salter, "Editor's Introduction," in *Communication Studies in Canada/ Études Canadiennes en Communication*, ed. Liora Salter (Toronto: Butterworth's, 1981), xi-xxii, xx.

³⁵⁷ See also Charles T. Meadow, *Messages, Meaning, and Symbols: The Communication of Information* (Lanham, Md.: Scarecrow Press, 2006).

consumers of legal information. Simultaneously, however, they were being groomed to be customers of legal services, as lawyer-authors sought consciously to profit from publishing self-help information while (perhaps unconsciously) also promoting the value of an essentially rival product, direct professional assistance.³⁵⁸

The Municipal Law Book in Canada-West/Ontario

The mid-nineteenth century was a time of transition for legal publications, as for all genres.³⁵⁹ Technology and the market for books of all sorts grew apace, but as several histories of the book have noted, there was a great deal of “speculative uncertainty” in the publishing business.”³⁶⁰ At mid-century, Upper Canadian authors and publishers experimented with different types of print products that might tempt the suddenly numerous group of local politicians and clerks. Though municipal corporations were provided with copies of consolidated statutes at government expense until 1868, no further information was forthcoming from the province.³⁶¹ Some councils hired lawyers as clerks, but this would not have been an option for many smaller or rural communities, especially in the early part of the period.³⁶²

³⁵⁸ The eventual ascendancy of the annotated statute format led to a somewhat a pyrrhic victory for lawyer-authors. Even as the lay municipal market was wrested from lay authors, it became attenuated and was eventually more or less abandoned, a result which the lawyer-authors may ironically have done much to advance by their self-serving emphasis on the dangers of legally-uninformed local government action and their ambivalence as to the value of their published products as compared to their profession’s services.

³⁵⁹ George L. Parker, “The Evolution of Publishing in Canada,” in *History of the Book in Canada*, vol. 2, ed. Yvan Lamonde, Patricia Fleming and Fiona Black (Toronto: University of Toronto Press, 2005), 17-32; George L. Parker, *The Beginnings of The Book Trade in Canada* (Toronto: University of Toronto Press, 1985); Bryan Dewalt, “Printing Technology,” in *History of the Book in Canada*, vol. 2, ed. Y. Lamonde et al., 89-101; Balfour Halévy, “Publishing the Law in English Canada,” in *History of the Book in Canada*, vol. 2, ed. Y. Lamonde et al., 417-419. For developments in the U.S. see J. Parrish, “Law Books and Legal Publishing in America, 1760-1840,” *Law Library Journal* 72 (1979): 355-452.

³⁶⁰ Thomas Adams and Nicolas Barker, “A New Model for the Study of the Book,” in *A Potencie of Life: Books in Society: Clark Lectures, 1986-1987*, ed. Nicolas Barker (London: The British Library, 1993), 5-43, 12.

³⁶¹ Paul Romney, *Mr. Attorney: The Attorney General for Ontario in Court, Cabinet, and Legislature 1791-1899* (Toronto: University of Toronto Press for The Osgoode Society, 1986), 173.

³⁶² Elizabeth Bloomfield, “Lawyers as Members of Urban Business Elite in Southern Ontario, 1860 to 1920,” in *Beyond the Law: Lawyers and Business in Canada, 1830 to 1930*, ed. Carol Wilton (Toronto: University of Toronto Press for The Osgoode Society), 112-48. Leeds and Grenville Counties had a non-lawyer as clerk until 1876.

Municipal law in the United States in the nineteenth century has been depicted as big business.³⁶³ The same seems to have been true of Upper Canada, if the number and variety of publications is any indication. The bibliographies of legal publications from these years show that municipal law seems to have run closely behind civil procedure and practice and slightly ahead of insolvency as the legal subject most likely to appear profitable to authors and publishers.³⁶⁴ The tried-and-true form books, and justice of the peace manuals, which often included municipal law and other peripheral areas of general legal interest, overlapped during the period with the more specialized works which would eventually supplant them.³⁶⁵

In this chapter I focus on those products which were explicitly designed to appeal to the local government market (although several were aimed at other groups as well). I have arranged these first by format and then chronologically within each category. Only one was an alphabetic statutory digest: *The County Warden and Municipal Officer's Assistant*, by Thomas S. Shenston (1851).³⁶⁶ There were a number of statutory compilations, including five editions of Scobie's *Municipal Manual for Upper Canada* (1850, 1851, 1852, 1853 and 1855), as well as Thomas Wills' *A Compilation of The Acts respecting the Municipal Institutions of Ontario* (1870), and Rupert Etheridge Kingsford's *Collection of such of the Revised Statutes of Ontario, And of the*

³⁶³ See Joan C. Williams, "The Invention of the Municipal Corporation: A Case Study in Legal Change," *The American University Law Review* 34, no. 2 (1985): 369-438; Joan C. Williams, "The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law," *Wisconsin Law Review* 1986, no. 1 (1986): 83-154; Gerald E. Frug, "The City as a Legal Concept," *Harvard Law Review* 93, no. 6 (1980): 1057-154; Lawrence M. Friedman, *The History of American Law*, 3rd ed. (New York: Simon & Schuster, 2005), 400-3.

³⁶⁴ The standard references are Reynald Boulton, *A Bibliography of Canadian Law* (Ottawa: Canadian Law Information Council, 1977), Reynald Boulton, *A Bibliography of Canadian Law: Supplement [Bibliographie Du Droit Canadien]* (Ottawa: Canadian Law Information Council, 1982) and W. Harold Maxwell and Sweet & Maxwell, *A Legal Bibliography of the British Commonwealth of Nations*, 2nd ed. (London: Sweet & Maxwell, 1955).

³⁶⁵ For form books in Canada, see Halévy, "Publishing the Law in English Canada," especially 417-18. For the United States, see Erwin C. Surrency, "The Beginnings of American Legal Literature," *Journal of American Legal History* 31 (1987): 207-18.

³⁶⁶ Thomas S. Shenston, *The County Warden and Municipal Officers' Assistant, containing a complete synopsis of the Municipal Council and Municipal Council Amendments Act ... to which is added a large number of tables and forms for the use of municipal corporations and their officers* (Brantford: Herald Office, 1851) [hereafter Shenston, *The County Warden*].

Acts of the Legislature of that Province passed in the Session 41 Victoria, 1878, as relate to Municipal Matters, (1878).³⁶⁷ Judicial contributions to the law were the subject matter of the aborted *Municipal Reports* (1863), edited by Robert A. Harrison with Thomas Hodgins.³⁶⁸ Much more successful were the monthly periodicals, the *Upper Canada Law Journal and Local Courts Gazette*, later the *Upper Canada Law Journal and Local Courts and Municipal Gazette*.³⁶⁹ A spin-off from the latter, the *Local Courts and Municipal Gazette*, ran from 1865 until it was re-absorbed by its parent publication in 1872.³⁷⁰ The final category is the annotated act, a legal genre just emerging in this period that would prove the model for much successful legal publishing in the future.³⁷¹ Four editions of variously titled *Municipal Manuals* by Robert A.

³⁶⁷ Hugh Scobie and J. Balfour, *Scobie & Balfour's Municipal Manual for Upper Canada for 1850* (Toronto: Scobie & Balfour, 1850); Hugh Scobie, *Scobie's Municipal Manual for Upper Canada*, 2nd ed., with supplement, containing the Municipal Corporations Act (Toronto: H. Scobie, 1851); Hugh Scobie, *Scobie's Municipal Manual for Upper Canada*, 3rd ed. (Toronto: H. Scobie, 1852); Hugh Scobie, *Scobie's Municipal Manual for Upper Canada: containing, besides the contents of the three previous editions, the acts that have since been passed by the Legislature of the province, to the end of the year, 1852, in reference to municipalities and the municipal system established in Upper Canada: with a copious index*, 4th ed. (Toronto: H. Scobie, 1853) [hereafter Scobie, *Municipal Manual*]; Hugh Scobie and J. Balfour, *The Municipal Manual for Upper Canada*. 5th ed. (Toronto: Thompson & Co., 1855; Thomas Wills, *A Compilation of the Acts Respecting the Municipal Institutions of Ontario, A.D. 1870* (Toronto: Hunter, Rose, 1870)[hereafter Wills, *Compilation*], R. E. Kingsford, *Collection of such of the Revised statutes of Ontario and of the acts of the legislature of that province passed in the session 41 Victoria, 1878: as relate to municipal matters* (Toronto: Hunter, Rose & Co., 1878) [hereafter Kingsford, *Collection*].

³⁶⁸ Robert A. Harrison and Thomas Hodgins, *The Municipal Reports: containing reports of cases arising under the municipal and school laws of Upper Canada* (Toronto: W.C. Chewett, 1863) [hereafter Harrison and Hodgins, *Municipal Reports*].

³⁶⁹ The journal published under the first of these titles from 1855 to 1864, when it narrowed its scope to legal professionals, becoming the *Upper Canada Law Journal*, and after confederation in 1867, the *Canada Law Journal*; The Upper Canada Law Journal, [hereafter UCLJ] v.1-10 (Jan. 1855-Dec. 1864); new series v.1-3 (Jan. 1865-Dec. 1867); Jan. 1855-Dec. 1858; The Upper Canada Law Journal And Local Courts' Gazette [hereafter UCLJLCG]; Jan. 1859-Dec.1864; The Upper Canada Law Journal And Municipal And Local Courts' Gazette [hereafter UCLJMLCG] Jan. 1865-Dec. 1867.

³⁷⁰ The Canada Law Journal [hereafter CLJ] v.4-v.58 (Jan. 1868-Dec. 1922; Local Courts and Municipal Gazette [hereafter LCMG] (Toronto: W.C. Chewett, 1865-1872).

³⁷¹ See Erwin C. Surrency, *A History of American Law Publishing* (New York: Oceana Publications, 1990), 77 and Joel Fishman, "The History of Statutory Compilations in Pennsylvania," *Law Library Journal* 86 (1994): 559-96. Harrison's previous work took this form, apparently on the advice of Judge Gowan, who gave him a volume to use as a model; The unpublished diaries of Robert A. Harrison, transcribed by Barbara Goodfellow [hereafter Harrison Diaries], AO, MU 8476- 8478, Tuesday, 13 May 1856. See generally the extensive introduction in Peter Oliver, *Conventional Man: the Diaries of Ontario Chief Justice Robert A. Harrison, 1856-1878* (Toronto: Published for the Osgoode Society for Canadian Legal History by University of Toronto Press, 2003).

Harrison (1859, 1863, 1874 and 1878) combined the statutory and the judicial by way of extensive annotations of the major acts, with commentary on policy and practice by the author.³⁷²

Some of these publications were self-consciously reflective on their aim and purported value to the reader, others were not. The quality and quantity of direct evidence on the nature and scope of municipal law to be found in prospectuses, editorials, and introductions, as well as indirectly in the omissions and inclusions and general presentation varies enormously. Unfortunately, there is no direct information on sales or numbers for any of these works, but some supplementary information on the success of Harrison's manuals is to be found in the book reviews in the *Upper Canada Law Journal* and *Local Courts and Municipal Gazette*, the Toronto newspaper *The Daily Globe*, and publishers' advertising which appeared in conjunction with several of the publications, as well as in the extensive diaries of Harrison himself. The configurations and lifespan of the periodicals (and their editors' explanations) and the publication of additional editions of the manuals provide indirect evidence of what appealed to the market and may therefore have had the greatest impact on the legal environment.

The Digest-Manual

Thomas S. Shenston was a non-lawyer, an autodidact who had served as a Justice of the Peace and District Councillor.³⁷³ Despite the piety of his declaration in the preface of *The County*

³⁷² Robert A. Harrison, *The New Municipal Manual for Upper Canada*, (Toronto: MacLear, 1859)[hereafter Harrison, *Municipal Manual* (1859)]; Robert A. Harrison and Henry O'Brien, *The Municipal manual for Upper Canada*, 2nd ed. (Toronto: W.C. Chewett, 1867) [hereafter Harrison, *Municipal Manual* (1867)]; Robert A. Harrison, *The Municipal Manual: containing the municipal and assessment acts, and rules of court for the trial of contested municipal elections, with notes of all decided cases, some additional statutes, and a full index*, 3rd ed. (Toronto: Copp, Clark & Co., 1874) [hereafter Harrison, *Municipal Manual* (1874)]; Robert A. Harrison and F. J. Joseph, *In press...a new edition (the fourth)...Harrison's Municipal Manual* (Toronto: Roswell & Hutchinson, 1878 [hereafter Harrison, *Municipal Manual* (1878)]).

³⁷³ David A. Burley, "Shenston, Thomas Strachan" *Dictionary of Canadian Biography*, <http://www.biographi.ca/EN/ShowBio.asp?BioId=40550&query=Shenston>; "Thomas Strachan Shenston," in *The Canadian Biographical Dictionary and Portrait Gallery of Eminent and Self-Made Men: Ontario Volume* (Chicago, American Biographical Pub. Co., 1880), 539-54,

Warden that his sole concern was to serve, he was probably well aware that self-help legal products had been a staple of the North American publishing world from its colonial beginnings, and that while following the handbook format might not guarantee success, it had at least this potential.³⁷⁴ Most of these digests, arranged alphabetically by topic, were designed primarily for justices of the peace, but some were augmented with information for other judicial officers, such as coroners, sheriffs, constables and bailiffs. One of the most popular, by Richard Burn, included information for parish or township officers, and others in England and the United States had had success catering exclusively to the latter group.³⁷⁵

Many of these prototypes were sophisticated efforts that both paraphrased and integrated statute and case law. Shenston, despite his claims to “a good deal of labour, thought and care,” was content to regurgitate small and large chunks of the statutes, in very small font to boot.³⁷⁶ The appendices, which included precedents for oaths of office, assessment rolls, notices, petitions, returns, and reports on the selection of judges, standing rules and regulations and “The Municipal Clerk’s Ready Reckoner,” a table showing the rate in the pound that would be necessary to raise a required amount at various levels of municipality, and calculation of the Lunatic Asylum Tax, were also probably not original. Pirating was not uncommon among handbooks; as one chronicler has pointed out, the use of tested material tended to add value to

<http://www.canadiana.org/ECO/PageView?id=cf35867650cfcb21&display=08545+0609> [hereafter Canadian Biographical Dictionary]; Parrish, “Law Books and Legal Publishing in America,” 355.

³⁷⁴ Phillips, “A Low Law Counter Treatise?,” 202-19; Conley, “Doing it by the Book,” 257.

³⁷⁵ Richard Burn and John Blossett Maule, *Burn’s Justice of The Peace and Parish Officer*, 30th ed. (London: H. Sweet, Maxwell & Son and Stevens & Sons, 1869). Numerous manuals for parish, county and township officers were published in Great Britain, the United States and Canada.

³⁷⁶ Thomas S. Shenston, *The County Warden and Municipal Officers’ Assistant* (Brantford, Ont., 1851), preface, not paginated.

the publication.³⁷⁷ Ironically, Shenston did copyright his work, which was unbound, and at ninety-three pages more a pamphlet than a book.³⁷⁸

In his preface, Shenston writes of his decision to assist “the industrious classes” now involved in greater numbers in municipal government, who due to their busy lives would not have “the leisure or the inclination to study into the long and tiresome details of the Acts.” He cites his own experience of inconvenience at “not being able on the instant, to turn to some particular section or provision of the Act, to solve a doubt or confirm an opinion,” a situation exacerbated by the more “voluminous and complex” statutes on which our Municipal Corporations depend.”³⁷⁹ These he identifies as: The Municipal Act, the Municipal Council Amended Act [sic], and “such portions of the School, Assessment, Jury, and Tavern Licence Acts as impose *any* duty upon *any* Municipal Officer.”³⁸⁰ For our purposes it is noteworthy that ‘municipal law’ was not considered by this author to be confined to one act, and it was the duties imposed by all pertinent legislation that he considered particularly germane to his anticipated audience.³⁸¹

Given that Shenston was “ever busy with his pen,” and lived for another forty-odd years, continuing in other governmental offices, political and commercial endeavours, if the work was as likely to meet the needs of officials as he claimed, and soon in need of updating given constant changes in the law, it might be wondered why he never produced another edition.³⁸² Although his anonymous biographer claimed the *County Warden* had a “considerable circulation in every county of the Province,” it is doubtful that it was much of a financial success.³⁸³

³⁷⁷ Conley, “Doing it by The Book,” 269.

³⁷⁸ It is catalogued as a pamphlet by the Archives of Ontario.

³⁷⁹ Shenston, *The County Warden*, preface.

³⁸⁰ Ibid.

³⁸¹ Ibid.

³⁸² *The Canadian Biographical Dictionary*, 341.

³⁸³ Ibid; Shenston, *The Oxford Gazetteer*.

Shenston published another small book, *The Oxford Gazetteer*, the next year, but then abruptly ended his career as a municipal author, although he continued to publish on other subjects.³⁸⁴

Part of the reason for this ostensible lack of success may have been that he was not his own publisher—the *County Warden* was printed at the “Herald Office,” Brantford, and does not carry any other imprimatur. Historians have pointed out that a variety of hats were crucial to publishing success at this date; Hugh Scobie, who was at once a publisher, printer, journalist, stationer and bookseller, is a good example of a successful multi-tasker in the book trade at this time.³⁸⁵ Moreover, Toronto was already the publishing capital of the colony; a work from the hinterland with no marketing network would have difficulty competing with the other similar product on the market at the time, Scobie’s compilation.³⁸⁶ Like the other publications surveyed here, the *County Warden* was sold through subscription, to be paid in advance, as was the usual practice in colonial publishing, and Shenston seems to have fallen into trouble by anticipating sales.³⁸⁷ In a letter to the Leeds and Grenville Council he is candid about his precarious position: “It would be doing me a great favour if you could let me have the amount for the said 24 packages immediately. I have yet an amount to pay the printer for printing the work and cash is really very scarce with me.”³⁸⁸

When the acts were amended, as they were regularly, the value of a volume such as Shenston’s would soon depreciate. Its worth probably lay in its relatively low price (1 shilling,

³⁸⁴ *The Canadian Biographical Dictionary*, 341.

³⁸⁵ Parrish, “Law Books and Legal Publishing in America,” 355; Parker, “The Evolution of Publishing in Canada,” 17-32; Parker, “The Beginnings of The Book Trade in Canada,” 77.

³⁸⁶ See Parker, “The Beginnings of The Book Trade in Canada,” 77-79.

³⁸⁷ See Yvan Lamonde and Andrea Rotundo, “Marketing Strategies of Booksellers and Publishers,” in *History of the Book in Canada*, ed. Y. Lamonde et al., 230-239, 235; McCusker, “The Demise of Distance,” 295-321; Parker, “The Beginnings of The Book Trade in Canada,” 37; Parrish, “Law Books and Legal Publishing in America,” 359.

³⁸⁸ Emphases in original. Not surprisingly this desperation did not impress the council, who promptly repealed a resolution to make the purchase: Leeds and Grenville Council Papers, F 1740-3-0-91851 (3). Circulars advertising most of the publications here discussed can be found in the Leeds and Grenville council papers.

10 ½ pence) and in the material appended. But in this as well it was obsolescent: in a very few years, such material was available directly from stationers, who produced blank forms obviating the necessity for the clerk to copy from books such as these, and cheap pamphlets, which could be produced quickly to stay current.³⁸⁹ Another disadvantage may have been the alphabetical digest format. As J. A. Conley has argued, the “vast nature of the authority” of justices of the peace who dealt with petty crimes and disparate other matters set out in often ancient, much interpreted statutes, made such a format a rational choice for their manuals.³⁹⁰ The decisions of JPs seldom seem to have been judicially reviewed, so the details of the letter of the law may have been considered superfluous, as long as the general gist was provided.³⁹¹ But the wide discretion and relative immunity enjoyed by these appointed practitioners of low law were not shared by their elected successors in the business of local administration. As we have seen, the acts of municipal governments were subject to review at the initiative of ratepayers and also vulnerable to suits by individuals and other corporations in tort or contract. In such cases, a digest would be less useful than the verbatim wording of the statute.

Especially is this so when one considers the omnipresence of clerks in local governments. A salaried bureaucrat would be a different customer than an amateur JP. The clerk would need more than a general answer to a problem; he would need chapter and verse and ease of reference. Of all the manuals canvassed in this study, Shenston’s is the only one which integrated index and text. For the others, the extensiveness and detail of the index was evidently a major selling point. Simply put, the messages transmitted by the digest format were likely not in accord with the

³⁸⁹ Publishers advertised these products in the newspapers when announcing publications and many of these publications included price lists for forms of various sorts.

³⁹⁰ Conley, “Doing it by the Book,” 258. See also Douglas Hay, “England, 1562-1875: The Law and its Uses,” in *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955*, ed. Douglas Hay and Paul Craven (Chapel Hill: University of North Carolina Press, 2004), 66.

³⁹¹ As far as we know. It may be that future studies of county court records may reveal that JP decisions were reviewed at that level.

purchasers' perceived needs. Although W.C. Keele referred to the Municipal Acts in the 1857 edition of his justice of the peace manual, in the 1864 version the subject was not included even peripherally.³⁹² A form of legal publication that had once been standard for municipal officials was not to appear in Canada West/Ontario again.

The Statutory Compilations

The long pedigree of genre enjoyed by Shenston's *County Warden* was not shared by the statutory compilations with which it was contemporaneous. While several privately published chronological collections of legislation had appeared before the nineteenth century in various American jurisdictions, these were few. The topical statutory compilation was very much a feature of economic surplus: greater ease of publication, larger, more concentrated markets, and the increased legislative output of the nineteenth century.³⁹³ In Upper Canada, the statutory collections which were produced prior to 1850 all seem to have been official productions of current acts by publishers authorized as the King's or Queen's Printer.³⁹⁴ The first 'Municipal Manual' for Upper Canada was thus a significant innovation, evidence of the significance of the new lay market for municipal law.

The first of the manuals was published by the Scottish-born Torontonian, Hugh Scobie, proprietor of the *British Colonist* newspaper, in association with his partner, John Balfour, and

³⁹² W. C. Keele, *The Provincial Justice, or, Magistrate's Manual, being a complete digest of the criminal law of Canada, and a compendious and general view of the provincial law of Upper Canada: with practical forms, for the use of the magistracy*, 4th ed. (Toronto: H. Rowsell, 1858); W. C. Keele, *The Provincial Justice, or Magistrate's Manual: being a complete digest of the criminal law of Canada, and a compendious and general view of the provincial law of Upper Canada: with practical forms, for the use of the magistracy*, 5th ed. (Toronto: H. Rowsell, 1864).

³⁹³ Fishman, "The History of Statutory Compilations in Pennsylvania," 559; Surrency, "The Beginnings of American Legal Literature," 210-213.

³⁹⁴ Boulton, *A Bibliography of Canadian Law*; Maxwell and Sweet & Maxwell, *A Legal Bibliography of the British Commonwealth of Nations*.

entitled *Scobie & Balfour's Municipal Manual for 1850*.³⁹⁵ Like Shenston, Scobie and Balfour were concerned to forestall any misapprehension that the compilation, as a collection of material otherwise publicly available, might not be worth the price, with the assertion that collating this information “was attended with considerable labour.”³⁹⁶ To this pre-emptive defence they added judicious flattery of the reader: Shenston’s “industrious classes” thus became those “who interest themselves in the public affairs of the province.”³⁹⁷ The avowedly high-minded aim “to render the community familiar with the Municipal Laws and the mode of carrying them beneficially and legally into execution” also mirrored Shenston’s.³⁹⁸ Again we observe the message that purchase of the within publication will safeguard the purchaser from possible negative consequences both practical and legal.³⁹⁹

The subtitle set out the highlights of the manual in the typically longwinded nineteenth century style:

a map of the province...complete lists of the various municipal corporations of townships, counties, villages, towns and cities and the ward divisions[,] also the boundaries of the several division courts for the recovery of small debts, the times and places at which the courts are heard, and the name and address of the judge and clerk of each division: to which are added the Municipal Corporations Act, Road and Bridge Companies’ Act, and the various other acts of the legislature which confer powers, or impose duties on the municipalities.⁴⁰⁰

³⁹⁵ Subsequent editions were published under Scobie’s name alone: Hugh Scobie and J. Balfour, *Scobie & Balfour's Municipal Manual for Upper Canada, for 1850* (Toronto: Scobie & Balfour, 1850); Hugh Scobie, *Scobie's Municipal manual for Upper Canada*, 2nd ed. with supplement (Toronto: Hugh Scobie, 1851), 239; Hugh Scobie, “Just published, Scobie's municipal manual for Upper Canada,” in *CIHM/ICMH Microfiche series* (Sal., 1852), Scobie, *Scobie's Municipal Manual for Upper Canada: containing, besides the contents of the three previous editions, the acts that have since been passed by the Legislature of the province, to the end of the year, 1852, in reference to municipalities and the municipal system established in Upper Canada: with a copious index*, 367, vi; Scobie and Balfour, *The Municipal Manual for Upper Canada*.

³⁹⁶ Scobie and Balfour, *Scobie & Balfour's Municipal Manual for Upper Canada for 1850*, notice of the publishers, not paginated.

³⁹⁷ Ibid.

³⁹⁸ Ibid.

³⁹⁹ In like fashion, the publisher’s notice refers to those “on whom the duty devolves of carrying their provisions into effect,” emphasizing duty over power and conflating this with the duty to be informed by means of the product being touted: Scobie and Balfour, *Scobie & Balfour's Municipal Manual for Upper Canada for 1850*, notice of the publishers, not paginated.

⁴⁰⁰ Scobie and Balfour, *Scobie & Balfour's Municipal Manual for Upper Canada for 1850*, notice of the publishers, non-paginated title page.

Scobie's other publishing ventures, which included the *Canadian Almanac*, land surveys, and lithographs, apparently informed these choices. His background as an apprentice lawyer in Scotland also may have been influential, in the selection of jurisdictional geography and local courts and their personnel as matters of import.⁴⁰¹ Like Shenston, Scobie obviously considered that municipal law was not confined to the Municipal Act and that the law relevant to municipal actors was as much about duties as powers.

Scobie's choices for inclusion of "other acts" differed from and were more numerous than Shenston's. Scobie's "other acts" included The Division and Counties Act, An Act Describing Counties and Ridings, the Municipal Repeal Act (which had immediately preceded the Municipal Act), and "acts and parts of acts still in force" such as the Ferries, Highways, Houses of Industry, Township Officers, City of Toronto, Niagara Market, Militia Commutation, Line Fences and Water Courses, Dog Tax, Road Allowances and Lock up Houses Acts.⁴⁰² In his recognition that continuing acts are an important part of the law, Scobie showed a legal sophistication not shared by Shenston; all the additional acts included in *The County Warden* were passed in the year immediately after the Baldwin Act. This is not to say that Shenston's inclusions were not more practical, as befitted an author with local government experience. The Niagara Market Act (Scobie's inclusion) clearly would have had much more limited application than the Assessment Act (Shenston's inclusion).

Scobie's greater legal cognizance is also evinced by the express recognition that the law would not remain static. The publishers' notice to the first edition, observing, as had Shenston's

⁴⁰¹ David Ouellette, "Scobie, Hugh," *Dictionary of Canadian Biography*, <http://www.biographi.ca/EN/ShowBio.asp?BioId=38302&query=Scobie>; see also Parker, "The Beginnings of the Book Trade in Canada," 77.

⁴⁰² Scobie and Balfour, *Scobie & Balfour's Municipal Manual for Upper Canada for 1850*, notice of the publishers, not paginated.

preface, the great changes in the law and the extension of the municipal system, and the inconvenience of “Acts...scattered over several volumes of the Statute Book,” set out their plan to issue “annually, a Municipal Manual, embodying those changes which may hereafter take place with such other information as may be necessary.”⁴⁰³ The next year, the preface to the second edition announced that the first publication “having met with favour,” a second edition with supplement was being offered, each of which could be purchased separately, if desired.⁴⁰⁴ The second edition was more or less identical to the first, so the ability of prior purchasers to buy only what we would call ‘updates’ would have been an attractive feature, but the reprinting of the main volume would also mean that the market would not be restricted to prior purchasers.⁴⁰⁵

The second edition/supplement included an appendix of “Titles of Acts passed in 1849, 1850, and 1851 not contained in this Manual, but to which it may be sometimes necessary to refer,” which cited the pages of the “Official Edition of the Statutes,” with the (unstated) assumption that purchasers would own or have access to these.⁴⁰⁶ Essentially private acts—acts with a limited geographic reach, such as that respecting the Niagara Market—were relegated to this list, with the exception of “an act to enable the Municipal Corporation of the City of Toronto to assist in the construction of the Toronto, Simcoe and Lake Huron Union Railroad.”⁴⁰⁷ The supplement reproduced in full those acts included in Shenston’s manual, as well as acts for the erection of Lunatic Asylums and other public buildings, and an act respecting land surveyors.

⁴⁰³ Ibid.

⁴⁰⁴ Scobie, *Scobie's Municipal Manual for Upper Canada*, preface, not paginated.

⁴⁰⁵ The decision to publish editions and supplements annually seems a shrewd one, and it is not surprising that Scobie died a wealthy and influential businessman. Peter Oliver takes note of the comfortable financial circumstances enjoyed by Scobie’s widow and daughter (who became Robert Harrison’s second wife) in Oliver, *The Conventional Man*, 33.

⁴⁰⁶ Scobie, *Scobie's Municipal Manual for Upper Canada*, 2nd ed.

⁴⁰⁷ 13 & 14 Vic. c.81.

By the time the posthumously published fifth edition appeared, the supplements had begun to dwarf the original work. It was decided by Scobie's successor that it would be desirable to revise the primary work, abridging some of the acts, and excluding the flourishing school legislation entirely. The preface spoke of a plan to publish a separate manual on school law, but that never came to fruition, possibly because such publications under the aegis of and funded by the government began to appear about this time.⁴⁰⁸ Nevertheless, the fifth edition contained sixty-four acts and parts of acts, and an appendix which listed fourteen others.

Shortly thereafter, Scobie's widow sold his business.⁴⁰⁹ The profitability of municipal manuals had been made clear, however, and the successors to Scobie's enterprise were to launch a product onto the market a few years later that diverged from Scobie's model, namely the annotated manual by Robert A. Harrison. Yet the compilation model was not immediately abandoned. Two further attempts were made to jump on the municipal law publishing bandwagon using this format: the first, by Hastings county clerk Thomas Wills in 1870 and the second by Toronto lawyer Rupert Etheridge Kingsford in 1878.

Wills' introduction to his *Compilation of the acts respecting the municipal institutions of Ontario* echoed both Scobie's and Shenston's, as he assured potential purchasers that his purpose was to save them labour.⁴¹⁰ His rationale for the publication was that since the latest statutory consolidation there had been a number of amendments, resulting in "a difficulty of knowing precisely what the law is."⁴¹¹ Rather than simply publish the amendments, however, the author sought to provide value by integrating these with the statute amended, cutting out "all such parts of the Municipal Act of 1866 as have been repealed, and insert[ing] in lieu thereof the

⁴⁰⁸ Scobie and Balfour, *The Municipal Manual for Upper Canada*, preface.

⁴⁰⁹ Parker, "The Beginnings of the Book Trade in Canada," 133.

⁴¹⁰ Wills, *Compilation*, xix. This volume identifies the author as the County Clerk of the County of Hastings.

⁴¹¹ Wills, *Compilation*, preface, not paginated.

amendments, so as to read as the law now stands.”⁴¹² The acts included are presumably those that have been amended, though this is not entirely clear. In any event, it is worth noting that along with the Municipal, Assessment, Line Fences and Water Courses Acts, and the Act Regulating Travel on Public Highways which we have seen previously, Wills included acts and amending acts: an Act for the Prevention of the Spread of Canada Thistles, an Act to Amend the Act Imposing a Tax on Dogs, an Act respecting Weights and Measures and an Act for the Protection of Sheep. Although his selection of acts is sparser than that provided latterly by Scobie, Wills’ index is perceptibly longer.

The length and detail of the index of Rupert E. Kingsford’s *Collection of such of the Revised Statutes of Ontario, And of the Acts of the Legislature of that Province passed in the Session 41 Victoria, 1878, as relate to Municipal Matters* drew the commendation of the *Toronto Daily Globe*.⁴¹³ Along with the index, “prepared with much greater care than the index to the revised statutes” (which, ironically, Kingsford had helped edit), the *Globe* reviewer was impressed with the organization of this “exceeding useful volume.”⁴¹⁴ Part one included municipal matters generally, including the Municipal Act as revised, acts pertaining to the registration of debentures, exemption of firemen from various duties, support of destitute insane persons, property assessment, sale of intoxicating liquors, five acts on the subject of highways, two acts on public health, two on protection of the person (exiting public buildings, and from threshing machines), six acts under the category ‘Protection of Property,’ three concerning the ‘Protection of Game’ and one on the ‘Profanation of the Lords Day’. The second section

⁴¹² Wills, *Compilation*, preface, not paginated.

⁴¹³ Kingsford, *Collection of such of the Revised Statutes of Ontario and of the acts of the legislature of that province passed in the session 41 Victoria, 1878: as relate to municipal matters*; *Daily Globe*, Toronto, 19 April 1878; Tracy D. Hynes, “Kingsford, Rupert Etheridge,” *Dictionary of Canadian Biography*, <http://www.biographi.ca/EN/ShowBio.asp?BioId=41613&query=kingsford>.

⁴¹⁴ *Daily Globe*, 19 April 1878.

comprised two acts on drainage and five on the administration of justice. The third contained another eleven acts passed in 1878, all but two of which amended acts appearing in other parts of the volume. Of the two exceptions, one repealed the act protecting fur bearing animals; the other dealt with bridges in villages. When combined with a volume of education acts expected out shortly, the *Globe* thought that these forty-three acts were sufficiently comprehensive of municipal law: “[F]or all practical purposes the ordinary ratepayer will be able to dispense with the Revised Statutes altogether.”⁴¹⁵

The anonymous reviewer seemed to take for granted that Kingsford’s compilation was meant for a lay audience. He suggested the work might have been “the better for having incorporated.... the Agriculture and Arts Act, in view of the great number of agricultural associations which have under its operation sprung up all over the province...[because] those who take most Interest in these associations take also most interest in municipal government, and it would in their eyes very much enhance the value of the work, while it would add comparatively little to its cost.”⁴¹⁶ However this intention is not clear from the collection itself. Kingsford broke with the municipal law publishing practice to date by dispensing with an introduction or preface identifying and addressing his audience. One might be led to doubt as well by Kingsford’s later oeuvre: the municipal compilation was followed by several on legal matters that appear designed for a professional audience.⁴¹⁷ Most of these other works were re-issued several times, yet Kingsford never updated the municipal collection, and one can only speculate as to the reason. The handwritten marginalia found in the library and archival holdings of many such works show that lawyers were accustomed to note up legislative changes in their

⁴¹⁵ Ibid.

⁴¹⁶ Ibid.

⁴¹⁷ These are all on private law matters, mostly in treatise style.

own copies of statutes or other works. No doubt clerks and councillors would have done the same. While the categorizing of statutes according to general subject was no doubt attractive, neither that nor the improved index probably would have made the work into enough of a seller to justify the cost of a very substantial volume.

Probably the principal reason why neither Kingsford's nor Wills' municipal works was ever revised and republished, however, was their format as exclusively statutory compilations. By 1878, municipal law consumers could not help but have become aware that not only was the legislation making up the Municipal Law becoming increasingly complex, extensive, and unsettled, as Kingsford's collection attested, but that statutes alone comprised only part of the relevant law. The importance of judge-made law and statutory interpretation was a lesson they had been taught by a series of publications in which Robert A. Harrison was a key figure. In his successful annotated municipal manuals, and even more directly in the *Upper Canada Law Journal* and *Local Courts and Municipal Gazette*, as well as the ill-fated *Municipal Reports*, Harrison and his colleagues underscored the importance of case law to prudent municipal administrations.

The Case Reports

Robert A. Harrison and one of his law partners, Thomas Hodgins, were responsible for an early, but conspicuously unsuccessful experiment in the embryonic genre of topical case law reports. The published volume entitled *The Municipal Reports* bears the date 1863, and optimistically proclaims itself volume I, covering the years 1845-1851. Unfortunately, no prospectus seems to have survived (though Harrison's diaries indicate that there was one). The volume contains no introduction or preface to explain either its birth or death, but the reports seem to have had their

genesis in a conversation between Harrison and his publishers in January 1859, about the time he was about to publish his first *Municipal Manual*.⁴¹⁸

By this time Harrison was already a successful author, with a well-received annotated volume on civil procedure and several years of editorship of the *Upper Canada Law Journal* and *Local Courts and Municipal Gazette* to his credit.⁴¹⁹ The idea seems to have been his own. His diary records that his publishers “applauded the idea,” but that one suggested that cases on school law should be included, to which the diarist had graciously assented.⁴²⁰ Harrison’s former mentor, Judge James R. Gowan, was less sanguine.⁴²¹ In another entry, Harrison reports Gowan’s warning that the reports would not be likely to succeed.⁴²² This Harrison decided to disregard, attributing it to fears the reports would be competition for the law journal, which was Gowan’s brain child and in which he had a financial interest.⁴²³ The *Journal* (under Harrison’s self-interested editorship) itself was also sanguine about the reports’ prospects. Possibly in a disingenuous attempt to boost sales for the reports, which were described as “likely to succeed,” an editorial in January 1861 graciously allowed that “[t]here is room for both [reports and journal.] Our spheres are not precisely the same.”⁴²⁴

That was something of an overstatement. The case reports can most charitably be described as uneven. The reports were not original, having been previously published in one of the officially sanctioned court reports. They were reproduced with the headnote and index/digest

⁴¹⁸ In the course of its obituary of Harrison, the *Canada Law Journal* stated that the *Reports* had been designed as a companion to the municipal manual. They excused the demise of the reports as the result of overlap: *Canada Law Journal* [hereafter CLJ], Tuesday, 23 November 1878; Harrison diaries, Saturday, 8 January 1859.

⁴¹⁹ Harrison diaries, Saturday, 8 January 1859.

⁴²⁰ Ibid.

⁴²¹ For Gowan and his relationship with Harrison, see Desmond H. Brown, “Gowan, Sir James Robert,” *Dictionary of Canadian Biography*, <http://www.biographi.ca/EN/ShowBio.asp?BioId=40865&query=gowan>.

⁴²² Harrison diaries, Saturday, 15 January 1859.

⁴²³ Brown, “Gowan, Sir James Robert.”

⁴²⁴ UCLJLCMG, Jan 1861 editorial, UCJLCMG, 1.

unchanged, with abbreviated citations to the source. It can be assumed that Harrison and Hodgins had permission for these; the reporter's intellectual property ownership was implied on occasion in the *Journal*, when reporters were given credit and thanks.⁴²⁵ Many of the annotations (presented as footnotes) were extensive and technical, but many others were sparse and jejune. If this imbalance is due to the dual editorship, it is likely, given the evidence of their later careers, that Harrison was responsible for the technicalities and Hodgins the fatuities, as well as the silences—many of the cases lack any commentary at all. Although Harrison does not blame Hodgins for the demise of the reports directly, by 1863 he was constantly complaining in his diary that Hodgins was lazy and a dead weight on the firm, and shortly thereafter he discontinued the partnership.⁴²⁶

Nevertheless, even had the annotations had been more consistent, it is not clear that the reports would have had greater longevity. Not only were some of the cases selected not clearly related to either of the ostensible subjects, but the years covered were not current. As one note stated, somewhat defensively, “[s]ome of the early cases given in these reports may appear to be obsolete and useless, but are still retained with a view not merely to be completeness of the series, but for their own intrinsic value, which is not always apparent, but often in practice discovered.”⁴²⁷ Only lawyers, and indeed lawyers with Harrison's command of the field, would find much value here. A better strategy might have been to start at the present and work backward, the strategy chosen by an early British topical series, the *Property Lawyer*.⁴²⁸

⁴²⁵ UCLJLCG, May, 1856, editorial.

⁴²⁶ Harrison Diaries, Saturday 14 February 1863 (the year in which the reports were published in book form), Harrison wrote that his patience was “exhausted” by Hodgins.

⁴²⁷ Harrison and Hodgins, *Municipal Reports*, 12.

⁴²⁸ *The Property Lawyer* (London: H. Butterworth, 1826). This series did not last long either, nor did many of the other early topical reports which started and stopped in Britain during the nineteenth century. Daintree, “The Legal Periodical: a Study in the Communication of Information”; W. D. Hines, “The Development of Legal Periodical Publishing in Great Britain between 1750 and 1939” (M.Lib. thesis, University of Wales, 1985). For the U.S., see Bernard J. Hibbitts, ““Our Arctic Brethren;” Canadian Law and Lawyers as Portrayed in American Legal

A review of one of Harrison's non-municipal works in the *Canada Law Journal* attributed the failure of the reports to the fact that the *Manual* "so covered all the ground."⁴²⁹ Would the *Municipal and School Reports* have succeeded had they been less narrow? The case of an even less successful competitor suggests not. *The Municipal Economist*, the "sickly existence...and premature death" of which *The Upper Canada Law Journal* marked "in feelings of sadness rather than triumph," had attempted to be the obverse of the *Reports*.⁴³⁰ Maclear & Co.'s Prospectus announced it to be a non-partisan attempt to

embrace...the "professional" consideration for Road making Bridge building, and other works of construction commonly controlled by the Municipalities in which they are situated; together with occasional chapters on Street Architecture and Building, with especial reference to the beauty of our Towns, the sanitary condition of our dwellings, and their safety from incendiary or accidental fires....[and] particulars of...Improvements as have been adopted in the older Towns of Europe and America....⁴³¹

Legal decisions would also be included. But the rosy prospect of practical knowledge sharing did not, as hoped, "secure the support of every one interested in the promotion of sound local legislation." It does not appear that an issue was ever published.⁴³² Perhaps the price—\$3.00 per year payable in advance—was too steep, or the material poorly chosen and presented, or not considered relevant. Perhaps the target group was insufficiently broad, or considered itself well-served by the more established monthly, the *Upper Canada Law Journal and Local Courts and Municipal Gazette*, which claimed that the *Economist* and other rivals had "started in the hope of

Periodicals, 1829-1911," in *Essays in the History of Canadian Law*, vol. 8: *In Honour of R.C.B. Risk*, ed. G. Blaine Baker and Jim Phillips (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 1999), 241-280; Joel Fishman, "An Early Pennsylvania Legal Periodical," 22.

⁴²⁹ CLJ, November 1875.

⁴³⁰ UCLJ, Editorial, January 1861.

⁴³¹ The only evidence I have been able to find are the references in the *Upper Canada Law Journal*, and a copy of the prospectus glued onto an inside cover of the Osgoode Hall Law School Library copy of the first edition of Harrison's *Municipal Manual*.

⁴³² Ibid.

diverting some of our municipal and other patronage.”⁴³³ Municipal lay readers eventually deserted the *Journal* and its successor, as well, but not for many years. And as long as they patronized these journals, the message heard by municipal lay readers was far from the eclectic, affirmative vision espoused by the ill-fated *Economist*.

The Periodicals

As noted above, the founder of the *Upper Canada Law Journal and Local Courts Gazette*, Simcoe County Judge James R. Gowan, seems to have had an instinct for what legal publications would sell.⁴³⁴ The prospects for a periodical were not auspicious. By 1855, the year the journal was launched, many such had been started in Great Britain and the United States, few lasting any length of time.⁴³⁵ As its full title promised, and editorials stressed, the *Gazette* was not aimed solely at a professional audience, a strategy which a later editorial frankly admitted probably would have doomed it to a speedy demise.⁴³⁶ Rather, the journal pledged to assist officers of the local courts (which included bailiffs, clerks, coroners and magistrates) and “Municipal Bodies.”⁴³⁷

Like its more purely legalistic American and British counterparts, the *Gazette* included a mix of editorials, announcements, case reports, and reviews of books and other periodicals and correspondence.⁴³⁸ Most reported decisions were Upper Canadian, emanating from various levels

⁴³³ UCLJ, Editorial, January 1861. It is unclear which publications are the other competitors referred to.

⁴³⁴ See Brown, “Gowan, Sir James Robert.” Brown states that Gowan did much of the writing himself and hired lawyers as front men: this does not seem to be true of Harrison.

⁴³⁵ Daintree, “The Legal Periodical”; Hines, “The Development of Legal Periodical Publishing in Great Britain”; Hibbitts, “Our Arctic Brethren,” 241-280; Fishman, “An Early Pennsylvania Legal Periodical,” 22. The prospectus for the *Journal* announced that it “would present the appearance of the English ‘Jurist,’” which had been in publication since 1838, but which, ironically, was just about to fold: UCLJ, January 1855, “Our Prospectus.” It was replaced by *The Jurist (New Series)* (London: H. Sweet, 1855-66).

⁴³⁶ LCMG, Editorial, January, 1865.

⁴³⁷ UCLJ, January 1855, prospectus.

⁴³⁸ Hibbitts, “Our Arctic Brethren,” 241-80; Fishman, “An Early Pennsylvania Legal Periodical,” 22.

of courts. Some of these were reported by the lawyers who had appeared in the cause; others by the judges who presided.⁴³⁹ Arrangements were made with the officially appointed reporters of Chancery, Queen's Bench and Common Pleas, to provide reports (apparently gratis) in advance of the reporter's own publication.⁴⁴⁰ Originally, the editors promised notes of explanation and context for English reports; although this never transpired, the occasional article discussed the application of an English case to the Ontario experience (while being careful to remind the reader that English cases should not be taken at face value).⁴⁴¹

In this, the lay reader would be reminded of his ignorance, a lesson which was continually emphasized, both explicitly and implicitly. The number of municipal cases appearing in the *Gazette* and *Journal*, especially in the early years, might have been a surprise to those whose previous exposure to the municipal law had been through the published statutes provided by the government or through the early statute-based manuals of Shenston and Scobie. Most of these were current and provided in full, others were digested from previously published reports in a column dedicated to "Municipal, School, and Magistrate's Law." Many of the longer cases were published over several months, as were various anonymously authored treatises on the law for bailiffs, coroners, and the like.⁴⁴² The editors were thereby able to maintain balance in the sixteen pages published each month, while ensuring that readers would maintain their subscriptions. Though produced monthly, the periodical was not meant to be ephemeral, but to be bound and kept for reference.⁴⁴³

⁴³⁹ Judge Gowan's court was well represented.

⁴⁴⁰ Later Practice and Chambers cases were added.

⁴⁴¹ UCLJ, Editorial, January 1855.

⁴⁴² None of these treatises seems to have been published in book or pamphlet form.

⁴⁴³ As is clear from the issue numbers, pagination, indices and title pages. Harrison's diary contains many reports of his trips to the publishers to have his various reports and periodicals bound.

Not all the ‘municipal’ cases dealt with duties or powers of municipalities, although many did. Some turned on technical questions regarding elections, assessments and licensing. Tort and contract cases involving municipalities were included as well, and it is telling that these were classified as ‘municipal’ in most such cases. Still others involved intra-municipal conflicts and the position of a municipal corporation or its officers vis à vis its ratepayers. A significant number dealt with the quashing of municipal by-laws, a fact the editors were quick to point out as a selling point to recalcitrant potential subscribers.

The *Journal* congratulated itself on serving its purpose by “guiding Officers of... Municipal Bodies in the discharge of their duties, in some cases preventing errors, in others saving from the consequences of persevering in illegal acts,” but occasionally implied that the beneficiaries of this service were insufficiently appreciative.⁴⁴⁴ In 1858, an editorial hectored municipal councils about the “endless number of by-laws which are set aside by the Courts and the endless complications of everyday affairs which in consequence result,” a state of affairs attributed by the editors to the reluctance of Municipal Officers “to patronise us in proportion to [their] wants.”⁴⁴⁵ An earlier editorial left no doubt as to the editors’ opinion of the dependency, born of ignorance, of municipal councils on those who were versed in the law:

Municipalities with the very best intentions are frequently plunged in difficulties by reason of defects in the Bye-Laws they pass. Their powers are large, the matters in respect to which they are empowered to make bye-laws extensive and varied. Corporations are creatures of civil polity; they have only such powers as the Legislature has conferred and these powers must be exercised in the method laid down by the laws. The members of Corporations, however competent in other matters, are not equal to the task of preparing complicated bye-laws, that require not only an acquaintance with the provision of the Statutes, but a familiarity with the general principles of Law and the decision of the courts.....⁴⁴⁶

⁴⁴⁴ UCLJ, Editorial, January 1857.

⁴⁴⁵ UCLJ, Editorial, January 1858.

⁴⁴⁶ UCLJ, Editorial, July 1856.

This scare mongering apparently paid off, for by December 1858 the editors were reporting that circulation from Municipalities had been “augmented.”⁴⁴⁷ This was also the year the publication moved to Toronto, pursuant to an arrangement with Gowan whereby Robert Harrison took over from Barrie lawyer James Patton as one of the two “co-conductors” for the journal.⁴⁴⁸ Because Harrison was known for his digest of Upper Canadian case law, several pamphlets on costs and practice, and the annotated Statutes of Practical Utility (a project prompted by Gowan) it was his mission to appeal to the law side of the subscription list.⁴⁴⁹ The other editor, another Barrie lawyer by the name of W.D. Ardagh, took over responsibility for the grab-bag of other subscribing groups.⁴⁵⁰ Perhaps for fear municipalities would feel their interests were being undervalued in this move to the metropolis, the journal simultaneously changed its name to become *The Upper Canada Law Journal and Local Courts and Municipal Gazette*.

The latent conflict of interest between the two target groups, lay and professional, was reflected by the editors. Promoters of legal self-help through the periodical and other publications, they were still at heart professionals whose inherent belief in the superiority of legal services undermined the *raison d'être* of a legal publication for non-lawyers.⁴⁵¹ Thus the July 1858 editorial quoted above, after stressing the importance of “reliable information” provided by their own organ, could not resist observing that professional advice would be even better, albeit somewhat half-heartedly:

One friend has suggested...that a professional man in each County should be appointed to advise the municipal authorities therein, and to prepare bye-laws as required, or one for

⁴⁴⁷ UCLJ, Editorial, December 1858.

⁴⁴⁸ Harrison diaries, 24 June 1857.

⁴⁴⁹ UCLJ, July 1857.

⁴⁵⁰ Ardagh was an in-law of Judge Gowan, whose wife was Anne Ardagh; see Henry J. Morgan, “W.D. Ardagh” in Henry J. Morgan, *Bibliotheca Canadensis*, (Ottawa, no publisher given, 1867), 12; Brown, “Gowan, Sir James Robert.”

⁴⁵¹ LCMG, “What is an arbitrator?” January 1865. The editors express concern that people are treating arbitrators as advocates. It is a “monstrous perversion,” whereby arbitrators “are heard talking of ‘their clients’ meaning those who named them, just as the lawyer speaks of the person who retained his services.”

the whole of Upper Canada.....Another friend has submitted a plan...that from every Municipality for which a Bye-Law was prepared by a competent professional man, a copy should be sent for publication to the Law Journal, accompanied with a note of the circumstance, or at least the name of the lawyer by who it was drawn....⁴⁵²

The additional cost would be “trifling.... [O]ne half of the municipalities in Upper Canada would be sufficient to cover the expense.”⁴⁵³

Though this idea seemed “feasible enough” to the editors, the municipal authorities appealed to apparently had other ideas.⁴⁵⁴ This is not to say they discounted legal advice: indeed the correspondence columns of the journal indicate that many councillors and their clerks sought legal advice from the editors, some questioners appearing on a regular basis.⁴⁵⁵ Although cognizant of the fact that correspondents were receiving legal advice worth far more than the cost of the subscription, the editors showed remarkable patience with these free-loaders, being content to warn readers that it was the journal’s policy not to answer questions of merely particular application before proceeding to answer the question which often seemed to meet this description, in detail.

This tiresome tendency of municipal councillors to be overly thrifty in their dealings with the Journal was further denigrated by the editors upon the divergence of the two readerships. *The Upper Canada Law Journal* and the *Local Courts and Municipal Gazette* divided in 1865, an event allegedly precipitated by the dislike of both groups of subscribers for paying for material allegedly of sole interest to the other.⁴⁵⁶ The price of the *Gazette* was set at \$2 per year, while *Journal* subscribers paid \$3. Yet despite the reduction in price and “the additional labour and

⁴⁵² UCLJ, Editorial, July 1856.

⁴⁵³ Ibid.

⁴⁵⁴ Ibid.

⁴⁵⁵ Some correspondents chose to remain anonymous. One who did not was Rowley Kilborn, Township clerk of Clifton, who is named as a letter writer a half dozen times in the combined journals.

⁴⁵⁶ LCMG, Editorial, January 1865.

expense” claimed by the editors, some members of the lay group seemingly remained sceptical.⁴⁵⁷ Sneered the editors of both journals (who now included Henry O’Brien, a sometime court reporter and author of various practical works for lawyers):

Some few there are amongst the magistracy and municipal bodies that seem to labour under the impression that it is quite out of the power of any mortal to add anything to their stock of knowledge, and so long as they have the “Consolidated Statutes,” which they fondly imagine contain *all* the law on every subject, they think they cannot go wrong. The less such people *really* know the more they *think* they know. Fortunately the localities blessed with such luminaries are few....⁴⁵⁸

And fortunately for the prospects of the new journal, there were yea-sayers as well. The Council of the County of Simcoe earned editorial approbation for having ordered several copies of both publications for the use of the County Council, and two copies of the *Local Courts and Municipal Gazette* for the use of each municipality within the County.⁴⁵⁹

Enough lay subscribers agreed with the County Council of Simcoe that the publication survived until 1872. Did it then cease to have value, and if so, was this due to editorial policy, or changes in the needs of the readership? Originally the content of the new publication was skewed to municipal interests, but these were broadly defined. Material of clear import to local officials and politicians, including serialized articles on the duties of Pound-keepers and Arbitrators, the effect on municipalities of the Temperance Act and reforms to the municipal and assessment acts were commonplace. A campaign to remedy the defects of the Dog Tax and Sheep Protection Act was a highlight of 1867.⁴⁶⁰ Municipal and School cases were duly and regularly reported. Relevant statutes were reported—sometimes verbatim—and often considerably in advance of public availability. The editors continued their forbearing answers to the legal queries of

⁴⁵⁷ Ibid.

⁴⁵⁸ LCMG, February, 1865. O’Brien also assisted Harrison by producing the index for the second edition of the *Municipal Manual*.

⁴⁵⁹ LCMG, Editorial, February 1865: “We venture to promise that it will not be money thrown away.”

⁴⁶⁰ An early experiment in compulsory default insurance. See the discussion in Chapter 8.

municipal clerks and councillors. However, other material seemed designed to appeal to the readers *qua* businessmen or private citizens. Lists of insolvents were an early recurring item. A regular column, “Simple Contracts and Affairs of Everyday Life,” excerpted cases and copied news items on seemingly every subject under the sun, including breach of promise, libel, railway negligence toward passengers, and the right to decide the religious education of infants. Cases from the Queen’s Bench and Common Pleas included many which would seem to be of marginal interest to localities or local courts, including a case (in which Harrison appeared as counsel), on fugitive felons. Articles on such doctrinal issues as the law respecting false pretences and the continual obituaries for high court judges as well seem to reflect the editors’ preoccupations rather than those of their purported readers.

That there would be overlap between the two journals was acknowledged from the beginning. Yet it is ironic that not until after the departure of Harrison, who had been recruited to serve a professional audience, did the legal begin to overwhelm the local in the pages of the *Local Courts and Municipal Gazette*. Irish and American reports began to take the lion’s share of column space dedicated to reported cases. Frequent reviews of practitioner-oriented publications and American and English legal journals with excerpts from the latter also raise the question of what value such items would provide to anyone but the “conductors” (whose own works were solicited for reciprocal “notice” by foreign publishers). One issue recommended such foreign periodicals as the *North British*, *Westminster* and *Edinburgh Reviews*, the *London Quarterly*, and *Blackwood’s* magazine with the rather condescending remark that “[n]o educated man, and no man who takes an interest in the world of thought should be without these Reviews.”⁴⁶¹

⁴⁶¹ LCMG, January, 1869.

Nowhere is the change in policy more clearly demonstrated than in the correspondence column. Queries began to be deflected and a quasi-professional threshold set for questioners. Hence the admonition in July 1870 that “correspondents should always, when asking questions, give full reference to statutes &c.... We take it for granted that questions are asked bona fide...and that they are not asked without some thought beforehand on the subject.”⁴⁶² By the time the decision had been made to cease separate publication of the *Gazette*, this message was blatant: “We cannot...give an opinion of the question put by our correspondent. It is a matter which should be referred to the legal advisor of the Council.”⁴⁶³ Although lay readers “who were at the first our principal supporters” were assured that they would be welcome subscribers to the newly enlarged (and more expensive) *Canada Law Journal*, other than continuing to note dates of significance to municipal government in the ‘diary’ which commenced every issue, the editors of the CLJ no longer assumed (or even pretended) that legal education for laymen by means of subscription to the periodical was desirable or even possible.⁴⁶⁴

The Annotated Manual

Of all the legal products sold to municipal actors during this period, Harrison’s municipal manuals appear to have been by far the most marketable. Four editions of Harrison’s manual were published during the period 1850-1880 (the fourth appearing shortly after Harrison’s death). That the Harrison ‘brand’ was considered a selling point is attested to by the production of a fifth edition, by his friend and free-lance assistant, Frank Joseph, in 1889, and a sixth, by

⁴⁶² LCMG, Editorial, July, 1870.

⁴⁶³ LCMG, “Correspondence,” December, 1872.

⁴⁶⁴ Ibid.

C.W. Biggar, in 1900.⁴⁶⁵ Though the flattering reviews of the manuals by the *Journal* and *Gazette* may be tainted by Harrison's association as editor and continuing contributor, the *Daily Globe* also testified that "the circulation of the Manual has extended to all parts of Upper Canada, and to professional men, as well as members and officers of councils."⁴⁶⁶ On Harrison's appointment to the Bench (as Chief Justice of Ontario) the *Canada Law Journal*, while opining that his annotated *Common Law Procedure Act* was "the most valuable legal work that has ever appeared in this country," did not claim it was his most popular work.⁴⁶⁷ The second edition of the manual though (naturally) not attracting the international attention of lawyers and judges, as had impressed the *Journal* about the CLPA, was "so popular that it was out of print within six weeks."⁴⁶⁸ In his diary, Harrison makes note of a comparable achievement—two months—for the third edition.⁴⁶⁹

This popularity seems to have translated into significant profit. Harrison's diary entry for 20 February 1875 states that 1060 copies of the third edition had been published, with a gross return of \$5719.00 (527 copies sold at \$5 a copy, and another 514 at \$6). After deducting a third for the publishers (a fact which the author appears to record with dismay), another \$2489.75 for printing and a few adjustments for his own copies, four copies to papers for review, and one for Judge Gowan, his share was \$1322.92.⁴⁷⁰ Harrison clearly thought this was inadequate, but considering that his earnings as one of the highest paid lawyers in the province in 1874 were

⁴⁶⁵ Robert A. Harrison and F. J. Joseph, *The Municipal Manual: containing the municipal, assessment, liquor license, and other acts relating to municipal corporations, together with the amending acts of 1888 and 1889 with notes of cases bearing thereon*, 5th ed. (Toronto: Rowsell & Hutchison, 1889); C. R. W. Biggar, *The Municipal Manual (part I) containing "The Municipal act" (R. S. O. c.223) and the amending acts of 1898, 1899 and 1900. viz. -61V. c. 23: 62V. (1st session), cc. 2 and 5: 62V (2nd session) cc. 26 and 30: and 63V. cc. 9, 33, 35, 36 and 37, with notes of cases bearing thereon*, 11th ed. (Toronto: The Carswell Co., 1900).

⁴⁶⁶ *Daily Globe*, 26 December 1866. However, it should be noted that Harrison wrote for the *Globe* occasionally and his publishers advertised his books, as well as other products, in this paper.

⁴⁶⁷ CLJ, 23 November 1875.

⁴⁶⁸ Harrison diaries, 23 November 1878.

⁴⁶⁹ Ibid, 1 February 1875.

⁴⁷⁰ Ibid, 20 February 1875.

\$12,002.48 (an amount he observes was double the salary paid to the chief justices), it was a not unsubstantial addition to his income.⁴⁷¹

Such success clearly had not been taken for granted when the prospectus for the first edition was issued in 1859. The *New Municipal Manual* for Upper Canada was priced at \$2.00 per copy, “[a]ll orders to be accompanied with cash.”⁴⁷² The first edition is dedicated to “The Municipal Councils of Upper Canada,” plainly the primary intended audience. Like Shenston and Wills, Harrison stressed his own “anxious and protracted” labour, and the inconvenience of dealing with legislation “promiscuously scattered through the twenty-two volumes containing the Provincial Statutes.”⁴⁷³ Unlike them he also emphasized the inconsistency and occasional unintelligibility of the “multitude of legislative enactments.”⁴⁷⁴ An additional factor heretofore ignored was the plethora of reported judicial pronouncements: “Since 1849 to the present [1859] owing in great part to this perplexity [of statutes], the Courts have been called upon in not less than one hundred and fifty cases to enunciate principles for the guidance of Municipal bodies.”⁴⁷⁵ While the latter and their mission are glorified (“The Municipal Laws of Upper Canada are in importance second to none...Every Municipal Corporation is a small parliament...”), councillors’ abilities and training are deprecated. Municipal powers, warned Harrison, are “extensive, yet limited”:

To ascertain in every case the existence or non-existence of a power—the nature of it—its precise limit, and the mode in which it should be exercised, is the object of all who are in any manner concerned in the administration of Municipal affairs. When it is considered that in the first instance these matters must be determined by Municipal Corporations themselves, seldom composed of men versed in the laws, often acting without the aid of professional advice, the importance of a *Guide* becomes manifest.⁴⁷⁶

⁴⁷¹ Ibid, 31 December 1874,

⁴⁷² Harrison, *Municipal Manual* (1859), prospectus.

⁴⁷³ Ibid.

⁴⁷⁴ Ibid.

⁴⁷⁵ Ibid.

⁴⁷⁶ Ibid.

The Prospectus goes on to outline Harrison's qualifications to provide this guidance, which are overtly professional.⁴⁷⁷

Harrison takes care to remind readers of the risks of incorrect action. Dire consequences await those who are ignorant or neglectful of the law, especially in the preparation of by-laws "on the legality or illegality of which large monied transactions are made to depend."⁴⁷⁸ In order to assist with this "[g]reat responsibility," a blank form for money by-laws is included.⁴⁷⁹ He then proceeds to float the idea propounded in the *Journal*, that a public functionary be appointed to provide advance approval for these so that people could invest in municipal debentures with confidence, but also notes that the legislature has acted to some extent to provide this security by the imposition of a six-month limitation period on actions to quash by-laws as long as they were not actually *ultra vires*. No cure is provided for the latter defect, however; the implicit message being that only correct information as provided by the manual will be a sufficient safeguard.⁴⁸⁰

As well as the Municipal Act, annotated with the gist of reported cases (with full citations), and Harrison's speculations as to likely future interpretation, the volume includes acts to which "Municipal officers...may in the performance of their duties find it necessary to refer."⁴⁸¹ These included such public statutes as the Assessment Act, the Public Health Act, the Act Regulating Line Fences and Water Courses, and the Consolidated Municipal Loan Fund, as well as acts preventing obstructions in rivers and rivulets, regulating highway driving, elections to the Legislative Assembly, weights and measures, requiring the annual returns of information

⁴⁷⁷ Ibid.

⁴⁷⁸ Harrison, *Municipal Manual* (1859), preface.

⁴⁷⁹ Ibid.

⁴⁸⁰ Ibid.

⁴⁸¹ Ibid.

to the Provincial Secretary, and regarding the confinement of lunatics, to name only a handful. There were three hundred and fourteen in all. Many were abridged, particularly private acts, such as those which provided for divisions of jurisdictions, annexations, and permission to incorporate or move to a higher level of incorporation. Consciously omitted are the Beef, Pork, Ashes and Road Corporation acts, many private acts, and education acts, because these were already contained in “a small work within the reach of all.”⁴⁸²

The claim of the prospectus that “the notes are written in a plain and popular style, such as may be understood by all who understand the human language” was not mere puffery.⁴⁸³ A barrister experienced in arguing before juries, Harrison was careful not to assume knowledge of legal terminology by his readers. Hence, for instance, notes explaining not only what a ‘tender’ is but also how to tender and how to respond to a tender, the two distinct meanings of police (constabulary and regulation) employed by the act, and that embezzlement is a “statutable [sic] stealing and a serious offence.”⁴⁸⁴ Harrison is also not shy about hectoring his audience on general behaviour, which he insists should be formal and legalistic:

It is common belief that a municipal body can do by resolution whatever may be done by by-law. Nothing can be more erroneous or more tend to the insecurity of municipal government.... [B]ut among people generally, and among that class composing Municipal Councils particularly, there is a dislike of formality, and in consequence the too frequent abandonment of by-laws for mere orders or resolutions....[w]henver a Municipal Council is in doubt....it would be much safer and wiser to use a by-law....⁴⁸⁵

Also emphasized are the many cases where there is a legal duty and consequent personal liability for a municipal official—usually the clerk. Harrison is careful to remind councils that their jurisdiction is geographically limited (for example, they cannot provide funds for a school

⁴⁸² It is not clear to what Harrison is (unkindly) referring. Harrison, *Municipal Manual* (1859), preface.

⁴⁸³ Harrison, *Municipal Manual* (1859), prospectus.

⁴⁸⁴ Ibid, 8 sec. 184.

⁴⁸⁵ Ibid, 85 sec. 186 note v.

situated outside their legal boundaries), and that they are subject to the common as well as statute law: “It is necessary for Municipal Councils to be very cautious when interfering with private property. An excess of authority may render them liable as trespassers.”⁴⁸⁶ In short, the municipal arena is depicted in detail as full of legal pitfalls for corporations, council members and their staff alike.

Occasionally Harrison is forced to admit that the act does not specify what he believes is the correct course of action: “The right of a Municipal Council to take moneys already appropriated and apply them to purposes different from the original appropriation is very questionable. Though sometimes done, it should never be encouraged.”⁴⁸⁷ Harrison confidently rebukes the legislature for its choice of wording regarding by-laws for preventing the growth of weeds detrimental to good husbandry, noting pedantically that “[a]ll weeds are more or less detrimental to good husbandry.”⁴⁸⁸ Nor is his *ex cathedra* advice restricted to the purely legal: “Drainage, as applied to Cities and Towns, is for sanitary purposes all important.” Though an “explanation of the principle of drainage cannot be expected to find a place in this work,” he recommends a treatise of the subject by a British civil engineer.⁴⁸⁹

The second, third and fourth editions of the manual follow a similar pattern and similar themes. With each version, the number of case citations increases exponentially. In the second edition “reference is made to more than six hundred” and in the third “no less than three thousand seven hundred.”⁴⁹⁰ The number, choice and extent of subsidiary acts also changes. The first edition provided annotations only for the Municipal Act; although the Assessment Act was

⁴⁸⁶ Ibid, 161 sec. 191 note u.

⁴⁸⁷ Ibid, 120.

⁴⁸⁸ Ibid, 136, note q.

⁴⁸⁹ Ibid, 161 sec. 290, subs. 15 and ff.

⁴⁹⁰ Harrison, *Municipal Manual* (1867, 1874), prefaces.

given in full, it was without notes. This and the other acts considered relevant Harrison set out chronologically, purportedly in order to show the “development” of the law, but probably as much for his own convenience in the methodical canvassing of the statute books. In the second and third editions the assessment act is also annotated, but all other acts are merely listed and the number sharply reduced—only forty in 1867 and twenty-four in 1874, probably the result of a decision to exclude private acts. The fourth edition listed thirty four, but also added substantial annotations to the Liquor Licensing Act.

A more subtle change followed a similar trajectory to that observed in the *Local Courts and Municipal Gazette*. The second edition was dedicated not to the Municipal Councils, but to Chief Justice Hagarty, the third to the Lieutenant Governor, and the fourth to the premier, Oliver Mowat. The preface to the second edition promotes lawyers as equal in importance to municipal actors as intended readers. Somewhat apologetically, the preface addresses its professional audience:

The first edition of the work received a generous support, as well from the legal profession as the great body of the Municipal Councillors and officers of Upper Canada...The delays which have occurred were....to some extent rendered necessary by reason of the Editor's great anxiety to make his work simple in its language and reliable in this exposition of the law. The work is intended not merely for lawyers, but for men unacquainted with the niceties of law. Most of the notes are therefore written in a popular style, and as free as possible from legal phraseology.⁴⁹¹

The third edition was “submitted to the Profession and the Public,” and the posthumous fourth “to the favourable consideration of the Legal Profession, Municipal Corporations, their Officers and the Public.”⁴⁹²

⁴⁹¹ Harrison, *Municipal Manual* (1867), preface.

⁴⁹² Harrison, *Municipal Manual* (1874, 1878), prefaces.

This change does not seem to be the result of municipal subscribers deserting the publication. Indeed, Harrison notes in his diary in December of 1874 that Mr. Clark (of Copp, Clark and Co., successors to the Chewett firm) advised that the retail firm Hart & Rawlinson had taken over exclusive supply to the municipalities, and had already sold about three hundred copies at \$5 (which price was guaranteed to those subscribing before December, those buying thereafter to be charged \$6) and that this "...will about pay the cost of publication."⁴⁹³ Rather, it seems that Harrison's intrinsic lawyer-like outlook was coming to the fore, encouraged by the expansion of his market to lawyers and even judges, and also perhaps to the influence of the celebrated American legal author, Judge John F. Dillon, whose treatise on Municipal Law was published in 1873.

Harrison wrote immediately to Dillon, pompously allowing that he had "not been disappointed in the purchase."⁴⁹⁴ He continued by boasting that

[M]unicipal Law is my specialty. I published a Municipal Manual for the use of our people that has already gone through two editions. By this mail I send you a copy of it. In it you will find much to interest you. And I can only say that the notes are at your entire disposal.... [I] shall expect you to reciprocate.....⁴⁹⁵

Dillon's reply arrived some ten days later. Slightly condescendingly, he thanked Harrison for the manual, complimenting him on the care with which it had been prepared, and granting that "it must be indispensable in Upper Canada."⁴⁹⁶ In a delicate display of one-upmanship, he commented that his own work "is expected to go to a second edition with the present year," adding that "more copies [had] been sold within six months after its issue than of any other law

⁴⁹³ Harrison Diaries, 7 December 1874.

⁴⁹⁴ Ibid, 9 July 1873.

⁴⁹⁵ "The principles of municipal law are the same in both countries.... I could point out to you some points in which our municipal law is in advance of yours. No doubt you could do the same in regard to ours. Neither is perfect. But both are more perfect than the law of England:" Harrison Diaries, 9 July 1873.

⁴⁹⁶ Harrison Diaries, 13 July 1873.

book published in [the U.S.].” He was gracious about Harrison’s “kind permission to refer to [his] notes” which he stated he would be happy to do “when they relate to matters of general interest,” and gave Harrison a reciprocal right to use his treatise.⁴⁹⁷

Harrison took full advantage of this in the third edition of the manual. “One feature...which distinguishes [this edition]” he remarks, “is the copious reference to the decisions of the courts of the several States of the United States of America.” The “able Treatise on the Law of Municipal Corporations published by Hon. John F. Dillon, LL.D....opened up...such a mine of Municipal wealth, that [the author] has not hesitated, with the full permission of Judge Dillon, to avail himself of such...as appeared to be of interest in this Province.”⁴⁹⁸ Harrison hastens to assure his readers that the municipal and assessment law of Ontario is “one of the most complete and most perfect codes of the kind,” adding the wistful, but no doubt forlorn hope that if the legislature “could be induced for a few Sessions to refrain from mangling the Acts, so that their provision would become far generally and better understood, it would be to the public advantage.”⁴⁹⁹

Whether or not legal readers were impressed with Harrison’s international connections, it is difficult to see how lay readers could have been expected to gain anything of value. Again, the indirect message would have been the more powerful. Not only were the acts by which they operated considered by the foremost expert to be regularly ‘mangled,’ but their own powers were under even greater challenge by the introduction of ‘Dillon’s rule’ to the discourse of municipal law. Whereas the first and second editions of Harrison’s manual had matter-of-factly noted the subordinate nature of local governments inherent in their status as corporations, which could by

⁴⁹⁷ Ibid.

⁴⁹⁸ Harrison, *Municipal Manual* (1874), preface.

⁴⁹⁹ Ibid.

common law only act *intra vires* and through the appropriate use of the corporate seal, (“creatures of civil polity,” as we have seen), the introduction of American cases in the third edition precipitated a more explicit confirmation of legal subordination. The note to section 7 of the Municipal Act, which stated merely that that “The powers of every Body Corporate under this Act shall be exercised by the Council thereof” adds the gloss that “[the municipality’s] powers are limited...It has no other powers than such as are expressly granted, or such as are necessary to carry into effect the powers expressly granted.”⁵⁰⁰ This rule of strict statutory interpretation, unremarkable in itself and routinely followed by English and Canadian courts, is expressly attributed by the author to American precedents. More comfortingly from the point of view of municipal personnel, Harrison does admit that if the action of municipal corporations is “held strictly within the limits prescribed by statute....they are likely to be favoured by the courts.”⁵⁰¹ In the fourth edition he goes even further toward the adoption of a Dillon-esque ideological/constitutional approach. Citing no fewer than two dozen solely American authorities, the author gives his opinion that “[M]unicipal bodies are the creatures of the Legislature and therefore subject to legislative control....”⁵⁰² He further speculates that the effect of the BNA Act would be to make municipalities even more subordinate.

The 1874 edition also imports Dillon’s suspicion of the bona fides of municipal councils.⁵⁰³ No comment or context is included to exculpate Upper Canadian counterparts. This lay-unfriendly approach became even more pronounced after Harrison’s death: although his

⁵⁰⁰ Ibid, 8 note k to sec.7.

⁵⁰¹ Ibid, 8 note k to sec.7.

⁵⁰² Harrison, *Municipal Manual* (1874), 14, note 1. “Before confederation the right of the Legislature to delegate such a power to a Municipal body was never questioned. But now that the powers of the local Legislature are limited by the B.N.A. Act, a question may exist as to the powers of the body to delegate legislative powers to other bodies.”

⁵⁰³ Ibid, 8 note k to sec.7: “Until... *Hodges v. Buffalo* was decided nothing was more frequent...than for city authorities to vote largesses and give splendid banquets of objects and purposes having no possible connection with the growth or weal of the body politic, thus subjecting their constituents to unnecessary and oppressive taxation.”

successors retained most of the notes included for the edification of non-lawyers, they did not add any of their own. Just as the *Local Courts and Municipal Gazette* became *de facto* a journal for lawyers, so the municipal manual became little more than a tool for lawyers acting for municipalities.⁵⁰⁴

Conclusion

Throughout the period 1850-1880, authors re-assembled the law for municipal actors from official sources and their own opinions according to their assessment of the needs of their customers, or what they could persuade the customers were their needs, emphasizing duties and restrictions. Though indefinite in scope—no two authors or editions identified the same content—the municipal law they presented comprised not just the foundational statute and amendments, but also myriad (and varying) collateral statutes, and a rapidly expanding jurisprudence. Legal restriction of local governments was the conceptual starting point for all these publications, the necessary condition for their very existence, and it continued to be in the material interest of the publishers to stress and even exaggerate this aspect of the law.

The legal communications marketed to municipal corporations, their members and their staffs, show a marked trend toward ‘juridification.’⁵⁰⁵ The legal environment for municipal actors became a more legalistic one, as the layman as legal author gave way first to the lawyer as legal author, and finally to the lawyer as lawyer. The ‘shadow of the law’ produced by this

⁵⁰⁴ The business of legal publication for the lay local government market fluctuated with different models and a changing market, but even when it achieved a successful combination, in the annotated manuals, it was unable to survive its own success. See Vivienne Denton, "Canadian Law Publishers: A Look at the Development of the Legal Publishing Industry in Canada," in *Law Reporting and Legal Publishing in Canada: A History*, ed. Martha L. Foote (Kingston, Ont.: Canadian Association of Law Libraries, 1997), 16-42, 41: "One area which has not been well served by the traditional law publishers is law for the layperson."

⁵⁰⁵ Davina Cooper, "Local Government Legal Consciousness in the Shadow of Juridification," *Journal of Law and Society* 22, no. 4 (1995): 506-26.

literature may have begun as a mere metaphoric dappling of the sunshine of local independence with the inclusion of duties and liabilities with powers in Shenston's handbook and Scobie's manuals; certainly it had imbued a darker hue with the increased legalism of the later publications.

We can only speculate on the effect that this had on municipal councillors' perception of their legal environment and on themselves as independent actors. It is important to keep in mind that municipal manuals and periodicals were not the only media of legal communication. Municipalities had access to the officially published statutes. Some may also have subscribed to the various authorized court reports. The non-legal press also carried lengthy reports of trials and editorials on statutory changes and judicial pronouncements. Municipal actors would also have their own legal experiences to draw on, and plenty of them, if the volume of reported cases and the dicta of the law journals are a reliable gauge. As time progressed, it was more likely that they would have more direct communication with lawyers. Harrison's diaries are authority for the fact that many localities seem to have had solicitors on retainer. Those that did not, and even some that did, seem to have been more than willing to seek professional advice on an ad hoc basis, even to the extent of coming to Toronto for it. Harrison records instances of being retained by municipalities; by the 1870s these references are numerous. In addition to work as a barrister in municipal litigation, he was in constant demand as a solicitor as well, preparing opinions and by-laws for townships and village councils who paid up to \$20.00 for the privilege of assistance from the self-proclaimed expert.

No doubt much of this turn to the professional may have been the result of the greater complexity of the source law at the legislative and judicial levels chronicled by municipal law authors. It is impossible to tell how much was due to the accompanying doom-saying. But the

effect of this normative backdrop cannot be discounted. Communications scholar Charles T. Meadow gives one definition of information as “that which reduces uncertainty in the recipient.”⁵⁰⁶ David R. Hall equates information with power: “If we consider printing (or print culture) as synonymous with information, then it seems axiomatic that information is a form of power to which some have greater access than others.”⁵⁰⁷ These definitions do not seem apropos in this case. Though information may indeed confer power on the recipient vis à vis the uninformed, it may undermine the power of the recipient vis à vis the communicator and thus the recipient’s sense of self-sufficiency. Commercial legal publications aimed at the municipal government market in the post Baldwin Act period in Canada West/Ontario can be seen as an exclusionist discourse designed to augment a sense of uncertainty and concomitant dependency in the audience while simultaneously touting the professional expertise and authorial omniscience of the communicators as the direct or indirect solution. Whatever the legal ‘reality’ may have been, the legal environment produced by these publications was hardly conducive to a perception of local government power or autonomy.

⁵⁰⁶ Meadow, *Messages, Meaning, and Symbols*, 110.

⁵⁰⁷ David D. Hall, “A Report on the 1984 Conference on Needs and Opportunities in the History of the Book in American Culture” in *Needs and Opportunities in the History of the Book: America, 1639-1876*, ed. David D. Hall and John B. Hench (Worcester [Mass.]: American Antiquarian Society, 1987), 11.

Chapter 5: The Agency of Local Government: The Municipal Council of the United Counties of Leeds and Grenville in the Shadow of the Law, 1850-1880

Chapters 2 and 3 of this dissertation deal with high law—statutes and reported cases. The municipal manuals discussed in Chapter 4 provided a filter for these, in effect turning high law output into low governance input. For local governments were—and are—low governments.⁵⁰⁸ As I have pointed out, both their lack of constitutional recognition and the corporate rather than Westminster structure set them apart from the ‘high’ parliaments and executives at the imperial, provincial and later dominion levels. But these terms of high and low should not obscure the fact that mid-nineteenth century Canada West/Ontario municipal councils were part of what the twentieth and twenty-first century would consider ‘establishment.’ Though lacking in status and power vis à vis the imperial, provincial, and later national governments, they should not be thought of as part of a group creating ‘law from below,’ to use the term famously coined by William Forbath and associates.⁵⁰⁹ The truly ‘below,’ the ratepayers, residents, claimants, and scofflaws we will meet in this and later chapters, are part of the legal, social and political environment in which the councils operated. They permeate this study, but are not its focal point.

The members of the municipal council of the United Counties of Leeds and Grenville and their employees were aware that they were subject to statutory and common law. Like the low law justices of the peace in quarter sessions who preceded them, their practice of low governance, both legislative and administrative, was conducted in the ‘shadow’ of this high law. I use this term as originally conceived by Robert H. Mnookin and Lewis Kornhauser to describe the operation of laymen’s law, as opposed to lawyers’ law; it was their observation that lay

⁵⁰⁸ The most comprehensive treatment of low law and local governance in Canada is Paul Craven, *Petty Justice: Low Law and the Sessions System in Charlotte County, New Brunswick, 1785-1867.*

⁵⁰⁹ Forbath et al., "Introduction: Legal Histories from Below," 759-66.

persons consciously behave and strategize using ideas of law in good faith which may or may not be ‘correct’ to legal professionals.⁵¹⁰ In this chapter I consider how the Leeds and Grenville council, at once the object of the high law and (low) governors to the further governed, exercised agency within this legal shadow.

As noted in Chapter 1, the records for the county council of the United Counties of Leeds and Grenville held at the Archives of Ontario offer an exceptional source of material for the student of mid nineteenth century local government—probably the best collection of primary documents for any Ontario municipality to have survived for this period.⁵¹¹ A few municipalities in Canada West/Ontario printed minutes, by-laws, and reports on a regular or occasional basis, and some of these are extant, including a few from Leeds and Grenville. However, supporting documentation tended not to be printed as part of the official record and was not retained by most municipal governments. Comprised of official and supplementary material in manuscript form, the Leeds and Grenville Counties’ Council papers are outstanding in their comprehensiveness. These cover the entire period without interruption, with the one exception of motion papers (physical vote papers for each councillor on each motion), which were only retained until 1875, a few years shy of the end point of this study. The counties’ clerk maintained

⁵¹⁰ See Robert H. Mnookin and Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce," *Yale Law Journal* 88 (1979): 950-97; see also Robert D. Cooter et al., "Bargaining in the Shadow of the Law: a Testable Model of Strategic Behavior," *The Journal of Legal Studies* 11 (1982): 225-51. James Snell's *In the Shadow of the Law: Divorce in Canada 1900-1939* (Toronto: University of Toronto Press, 1991) uses the term in a different sense, applying to situations where official law does not apply. In my opinion that phenomenon might more helpfully be categorized as extra-legal ordering, or legal pluralism. Compare Karsten, *Between Law and Culture*.

⁵¹¹ All the municipal records held at the Archives of Ontario were reviewed and a search made for municipal records held elsewhere. The primary sources used for this chapter are as follows: AO, County of Leeds and Grenville Fonds, Leeds and Grenville Council Minutes, F 1740-1, 1860-1880, on microfilm, MS 6918; AO, Leeds and Grenville By-laws, F 1740-2, 1859-1880 (incomplete) on microfilm, MS 6921; AO, Leeds and Grenville Council Papers, F 1740-8, 1850-1880, Boxes 12-28. Except where indicated, all citations to primary sources in this chapter are to the Council Papers. These are hereafter cited as ‘Leeds and Grenville council papers’ and by date, envelope number and the specific date of the document where available. The minutes of Leeds and Grenville Municipal Council are cited as ‘Leeds and Grenville council minutes’ and by date. Minutes of a few sessions (some with by-laws) Open Library, https://openlibrary.org/subjects/place:leeds_and_grenville. By-laws are cited by date, session number and by-law number.

copies of motions and resolutions, budgets, financial statements, contracts, arbitration awards, committee reports, and road commissioner reports, many in both draft and official form, as well as miscellaneous received material such as vouchers and receipts, oaths, bonds, circulars, and correspondence. Admittedly, there are some gaps and omissions in the Leeds and Grenville fonds. There are only a few sessions for which finalized, printed by-laws are extant. However, the process of passing or rejecting by-laws is carefully documented in the minutes, and some draft by-laws are included in the council papers.

In this and the following chapters I make use of this collection and related archival records to evaluate aspects of local government autonomy from 1850 to 1880. Chapter 6 focuses on the corporation as legal (re)actor—on the interaction of the Leeds and Grenville Counties Council with two other low law institutions, the locally based grand juries and the centrally directed prison inspectors. Chapter 7 leaves the county level to investigate the tax adjustment policies of three townships in the United Counties of Leeds and Grenville. The subject of Chapter 8 is petitions to the provincial legislature by municipalities, including the United Counties, so the frequent petitions addressed to higher levels of government from the counties' council are left to that chapter. The present chapter canvasses other law-related activities, considering the county council as a low legislature passing by-laws, as a quasi-administrative body weighing the requests of residents and dispensing county largesse, as defendant or potential defendant to negligence and nuisance claims, as a corporate organization, party to contracts, negotiations and arbitrations, and with the staff and solicitors employed to navigate these diverse law-related situations.

Legalism and Legality

The cultural climate in which the Leeds and Grenville counties' council operated, as revealed by these records, was decidedly legalistic. The records abound with references to law writ large and small, and to ideals of justice, fairness and equity.⁵¹² Any rights consciousness, on the other hand, if present at all, was subtle, masked by a blatant obsequiousness. On occasions when a disgruntled petitioner to council felt he was being treated unfairly (a not uncommon occurrence), his claim was only to "kind consideration." The members of council and their petitioners seem either to have had faith in the existence of an objective standard of fairness, or the statement was in itself a form of normative pleading; time and time again the petitions to council refer to "a fair remuneration" or a "just and honourable result." Precise sums are rarely adverted to in these cases and, where included, are generally accompanied with the rider that the claimant will accept and expect the council to decide what is fair in the circumstance.⁵¹³

This is not to say that the counties as a whole were particularly law abiding. The Brockville and Johnstown District areas of Upper Canada had a history of lawlessness involving pro-establishment agitation by Ogle Gowan of Brockville and the Orange Order he headed.⁵¹⁴ Gowan was the last warden of Johnstown District and the first warden of the United Counties of Leeds and Grenville, but the conservative rabble-rousing he espoused disappeared with the advent of the new union era and responsible government.⁵¹⁵ However, the records do reveal an

⁵¹² See Greg Marquis, "Doing Justice to 'British Justice': Law, Ideology and Canadian Historiography," in *Canadian Perspectives on Law and Society: Issues in Legal History*, ed. W. Wesley Pue and Barry Wright (Ottawa: Carleton University Press, 1988), 43-69.

⁵¹³ The absence of equitable considerations found by J. P. Reid in his examination of interpersonal dealings on the contemporaneous American overland trail does not seem to have characterized the legal culture of this microcosm of society in Canada West/Ontario; though perhaps this was due to the context—a status hierarchy of governed and the governors even at the level of low governance. See John Phillip Reid, *Law for the Elephant: Property and Social Behavior on the Overland Trail* (San Marino, Cal.: Huntington Library, 1979).

⁵¹⁴ See Carol Wilton, "'Lawless Law': Conservative Political Violence in Upper Canada, 1818-41," *Law & History Review* 13, no. 1 (1995): 111-36.

⁵¹⁵ See Ross Disotell, *Brockville: The River City* (Toronto: Natural Heritage/Natural History Inc., 1997), chapter 3.

undercurrent of resistance to low law authority by residents, particularly with regard to the enforcement of tolls.⁵¹⁶ The circumvention of and agitation against tolls can be seen as evidence of extra-legality or legal pluralism, as well as of straightforward illegality.⁵¹⁷ Opposition to tolls on allegedly impassable roads occurred both within and without the legal system. Incidents of arson and toll-evasion by the establishment of parallel routes over private land were not uncommon challenges for Leeds and Grenville toll-keepers. But toll resisters also gave formal notice of non-compliance and challenged the legality of tolls in local courts.⁵¹⁸ Both the corporation as defendant and the toll-evaders as plaintiffs seem to have preferred negotiation in these cases, but were willing to use the courts as a last resort.

In addition to the ubiquity of terms denoting justice and equity found in petitions to council, law consciousness is also evinced by the overt legalism with which the Leeds and Grenville United Counties conducted their proceedings. David Murray ascribes the tendency to legalism of the Quarter Sessions of the Niagara District in the decade prior to the Baldwin Act to the lack of differentiation between the judicial and local government functions.⁵¹⁹ Clearly this reasoning does not explain the similar behaviour of Leeds and Grenville Council post-Baldwin Act, unless perhaps as the result of inertia or path dependence. Frequent reference to statutory authority (both specifically and in general terms), an elaborate corporate seal, signatures and counter-signatures, recitals in excessively formal language, and dedication to rules of procedure

⁵¹⁶ See Michael S. Cross, "'The Laws are Like Cobwebs': Popular Resistance to Authority in Mid-Nineteenth Century British North America," *Dalhousie Law Journal* 8 (1984):103-124. David Gagan, in *Hopeful Travellers: Families, Land and Social Change in Mid-Victorian Peel County, Canada West* (Toronto: University of Toronto Press, 1981) finds that land speculators routinely swore false affidavits, 22-3.

⁵¹⁷ That is, that a system of norms, operating outside and in competition with the legal system, may have 'legitimated' otherwise illegal acts in the eyes of the community. See Henrik Hartog, "Pigs and Positivism," *Wisconsin Law Review* 1985 (1985): 899-925.

⁵¹⁸ They generally did so on the basis that the roads were inadequate, so travellers had no moral duty to pay.

⁵¹⁹ David R. Murray, *Colonial Justice: Justice, Morality and Crime in the Niagara District, 1791-1849* (Toronto: The Osgoode Society for Canadian Legal History by University of Toronto Press, 2002), 220.

for meetings combined to imbue the operation of local government in Leeds and Grenville with the formal appearance of authority and legitimacy. One example of this was that in most years one or more of the newly elected candidates was refused admittance to council for lack of, or the technical inadequacy of, sworn oaths and certificates of lawful election.⁵²⁰ All written oaths and certificates were maintained by the clerk as part of the municipal records, presumably intended to be in perpetuity: a measure of the importance of formal legitimacy.

Of course, self-conscious legalism can be a cloak for conscious illegality, but this does not seem to have been the case for this municipality. That does not mean that the council did in fact adhere to the law or proper procedure in all cases. Despite the apparent sophistication of the council and its long-serving clerk, James Jessup, serious defects were found in several of the by-laws that were referred to solicitors. At least one rule of procedure set out by the Municipal Act, requiring that the three required readings of a by-law not take place on the same day, was breached on a number of occasions. Frequently references to legislation, lawful on their face, left out (or mistook) chapter, section and/or regnal year, or vaguely referred to ‘the laws in force in the province,’ or ‘the act as amended.’

Yet the council (or its clerk) seems to have been sensitive to the substance of legislation, and particularly any changes thereto, if not to formal or procedural complexities. The course of motions shows little lag between the passage of a mandatory statutory provision and its enactment as a by-law, although some permissive sections were not acted on immediately. For instance, several years passed after counties were permitted by the legislature to enact by-laws for weights and measures inspection before Leeds and Grenville decided to do so. That the

⁵²⁰ They were admitted later in the session or at subsequent sessions.

successive councils were aware of the new power is attested to by annual unsuccessful motions in favour of the appointment of such an inspector.⁵²¹

Low Legislation

Of all the functions of municipal government revealed by the minutes, the legislative may have been the most ubiquitous, but perhaps least significant.⁵²² Aside from the occasional by-law to preserve public morals or regulate taverns or hawkers and peddlers, which can be considered acts of policy, almost all Leeds and Grenville counties by-laws during these years were pro forma acts of administration.⁵²³ Because the common law of corporations did not allow for much in the way of executive action per se, and this was unaltered by the statute, all routine matters such as appointments of county officers, setting of their salaries, replacing them, relieving them (and their sureties) from future responsibility, opening and closing and changing of roads (a habitual

⁵²¹ The Act respecting Weights and Measures was passed in 1859: 22 Vic. c.58. A by-law pursuant to section 6 of the act was eventually passed by the Council of the United Counties four years later: Leeds and Grenville council minutes, June session, 1863. One reason for the unpopularity of this initiative seems to have been the cost of the necessary equipment, which the province refused to subsidize. The finance committee still balked at the \$160 price in 1863, but was over-ruled by the committee of the whole: Leeds and Grenville council minutes, January session, 1863.

⁵²² Very little is known about nineteenth century by-laws in Ontario or elsewhere, although Raphaël Fischler's study of zoning by-laws notes an unsurprising evolution toward differentiation and specifics, including diagrams: Raphaël Fischler, "Development Controls in Toronto in the Nineteenth Century," *Urban History Review / Revue d'Histoire Urbaine* 36, no. 1 (2007): 16–31.

⁵²³ Unfortunately, there is no extant text or draft of the Leeds and Grenville by-law to preserve public morals, or any of its several amendments. A by-law of the County of Middlesex, no. 218 (amending no. 168) of 1868 may be analogous; this by-law prohibited gambling, vagrancy, giving alcohol to minors or apprentices, indecent exposure, blasphemy, profanity, obscene graffiti and the destruction of shade trees: https://archive.org/stream/cihm_56553#page/n5/mode/1up. The records of the various constituent municipalities of Leeds and Grenville at the Archives of Ontario are also spotty with regards to by-laws, but a complete run of by-laws for this period is available for the Township of McGillivray in Middlesex County: AO, Township of McGillivray Diffusion Material D240, microfilm GS 53 (Minutes and By-Laws 1843-1886). Like the United Counties of Leeds and Grenville, most of the McGillivray by-laws were of the routine administrative variety: tax levies, appointments, salaries and duties of township officers, roads, fences, boundaries etc. with only a few 'policy by-laws' for matters allowed to the township, including prohibitions against unsafe driving (no. 32, 1869), animals running at large (no. 8, 1850) regulating auctioneers (no. 6, 1855) taverns and gambling (no. 13, 1852), and preventing obstruction of streams (no. 33, 1869). Unlike those of Leeds and Grenville, the McGillivray by-laws are inconsistently numbered. They exhibit similar, if less detailed, legalism as the Leeds and Grenville by-laws, but less legality; the council was continually having to pass by-laws correcting previous by-laws and many are missing a signature, counter-signature or seal.

activity), setting the county levy, granting aid in the early years to townships and later years to agricultural societies and schools, paying all invoices, and changing meeting schedules were effected by by-laws. Most of these were discrete enactments, although authorizations of payment of invoices, grants, salaries and honoraria began to be grouped in omnibus by-laws to be approved at the end of each session early in the period.⁵²⁴ Routine by-laws or clauses in omnibus by-laws also provided endorsement for negotiated settlements with towns for their share of shared facilities, discounts on the assessments of some sub-municipalities, and regulation of the manner of printing council business and the public or private use of county facilities.

At the beginning of the period all executive acts were carried out in this legislative manner, complete with movers, seconders, and recorded votes for the main motion and any amendments (some of which were numerous), three readings, and the seals, signatures and countersignatures stipulated by the statute. Later in the 1870s, a few by-laws delegated authority to act in limited circumstances to the Warden. Most matters that were to be the subject of a by-law were referred to the clerk, to one of the standing committees or to a special committee for one or more reports. The council as committee of the whole—numbering twenty-five members in 1850, rising to thirty-three in 1879—would then debate, after which one of the councillors would move a motion to accept or reject the report, with or without amendment.

By-laws of the United Counties were numbered beginning with number one in 1850; however, by-laws of the previous regime, the Johnstown District, continued in force, and unless there was a reason to change these there was no move to re-enact or reprint them. Adding to or changing this corpus of district council law legislation, which numbered in the hundreds after

⁵²⁴ There were typically three sessions a year, each taking three to five days (not always consecutively). Special sessions called by the Warden for some pressing purpose were few.

less than a decade, was not a council priority.⁵²⁵ By-laws were sent to a printer from the beginning of the period; in the latter part together with the minutes of the session which had generated them.⁵²⁶

Formal resolutions passed by a majority of council were also common. Staff and solicitors were directed by this means. As well, resolutions were often, though not necessarily, the precursor of a motion leading to a by-law. One (atypical) printed set of resolutions has survived; unanimous (an uncommon feature), it was printed for distribution to other municipalities, who were importuned for a joint petitioning effort. Dated October 16, 1851, the numbered resolutions begin with thanksgiving for an abundant harvest, proceed to self-praise for councillors' efforts in road construction and improvement, and segue into council's preferences in provincial railway policy.⁵²⁷

Next to the routine administrative by-laws, by far the greatest percentage of legislative output of the united counties, especially in the earlier half of the period, related to the major road improvement project to which the resolutions of October, 1851 adverted. One of the first actions

⁵²⁵ By-law no. 26 was a by-law to repeal by-law no. 186 of the late District Council was passed in June 1852 (relating to the salary of the clerk).

⁵²⁶ A few printed sets of printed minutes and by-laws are extant; The Edith and Lorne Pierce Collection of Canadiana, Queen's University: By-Laws of the Municipal Council of the United Counties of Leeds and Grenville, passed at their session October, 1850 (pamphlet) (Brockville: The Recorder and Advertiser Office), <https://archive.org/details/by-laws-of-municip00leed> By-Laws of the Municipal Council of Leeds and Grenville, passed at their session June, 1851 (pamphlet), (Brockville: D. W. Wylie, Recorder Office), <https://archive.org/details/by-laws-of-municip00leed>, Minutes, reports, by-laws, &c. of the Council of the of the Corporation of the United Counties of Leeds and Grenville [microform]: second meeting for 1872 (June, 1872) (pamphlet), (Brockville: Office of the Recorder, Buell Street, 1872), https://archive.org/details/cihm_68116, Minutes, reports, by-laws, &c. of the Council of the of the Corporation of the United Counties of Leeds and Grenville: third meeting for 1872 (November, 1872) (pamphlet) (Brockville: D. Wylie, printer, "Recorder" Office, Buell Street, 1873), https://archive.org/details/cihm_68117; Minutes, reports, by-laws, &c. of the Council of the Corporation of the United Counties of Leeds and Grenville [microform]: second meeting, Brockville, 16 June, 1873, and a special meeting, 8 July 1873 (1873) (Brockville: D. Wylie, printed at the "Recorder" office, Buell Street) https://archive.org/details/cihm_68119; Minutes, reports, by-laws, &c. of the Council of the of the Corporation of the United Counties of Leeds and Grenville: third meeting for 1874 (Brockville: D. Wylie, printed, Recorder Office, Brockville), https://archive.org/details/cihm_68120.

⁵²⁷ In favour of a St. Lawrence to Lake Huron route and in opposition to the proposed Toronto to Halifax Grand Trunk: "Resolutions adopted unanimously by the Municipal Council of the United Counties of Leeds and Grenville, on the 16th day of October, 1851," https://archive.org/details/cihm_67577.

of the post-Baldwin Act council was to commence the macadamization of four main cross-county roads. By-law number 4, an exceptionally long and detailed enactment, set out the specifications of each road and the means of raising money for the improvements by tolls and provided superintendents for each in the persons of commissioners. More on the doomed history of the counties' macadamization efforts will be found below in the discussion of the contracting process; suffice it to say that the fact that by-law no. 4 had no sooner been passed than it was significantly amended by by-law no. 5 was not an auspicious beginning. Indeed, the year did not go by that did not see the county toll road by-laws either amended or repealed and replaced (occasionally in the same session), until the councillors finally gave in to defeat and transferred the roads to the townships in the mid-sixties.⁵²⁸

No other such major initiative was attempted during the period, although several by-laws—such as for the raising of money by debentures (for gaol and registry office construction or to re-pay bank loans), for the granting of bonuses to Railway or Joint Stock Road companies or for the joining or dissolution of subservient municipalities or school sections—were considered important enough to warrant the taking of legal advice or legal assistance in drafting. It is fair to say that the Leeds and Grenville council's agency was as a rule not expressed by its legislation, but through its spending power.

The Municipal Council as Administrator

The road macadamization project and other major building projects (such as the gaol and courthouse) were initiated by council through by-laws and executed by contracts under the oversight of commissioners reporting to council, but where the municipal corporation of the

⁵²⁸ Leeds and Grenville council minutes, 8 November 1864.

United Counties of Leeds and Grenville incurred expenditures for more minor infrastructure, it generally did so indirectly by means of grants, initially through a reactive process that bore some resemblance to that of an administrative tribunal. For most of the period grants-in-aid to townships, agricultural societies, charitable institutions, schools and occasionally individuals were initiated by a petitioner or petitioners.

Although the occasional letter of request to council without this format survives, these were almost always formalized afterwards with a petition. A letter might set out a claim or argument, but did not provide a medium for the inclusion of supporting evidence as did petitions, which were generally an amalgam of plea and evidence. The petitioning ratepayer or resident, or someone on his behalf, would make a request of council, and various neighbours would add their signatures, not simply to add their support by weight of numbers, but also in many cases to testify to the *truth* of the grounds for a claim to ‘justice’ from council. On occasion, supporting petitions would add additional grounds for the granting of relief to the original appeal. Thus, for instance, Elizabeth Bird, the lessee of a toll gate (a numerous class of petitioner), petitioned to have her rent reduced, listing the equitable reasons why the contract should not be enforced against her. Her neighbours’ petition testified to the truth of these grounds, and added that as a widow with small children to support she was worthy of charity as well as justice.⁵²⁹

Sometimes the petitioning process was adversarial, though it appears that in only one case did a party make use of a lawyer.⁵³⁰ Petitions would be presented for and against certain requests and the council would have to side with one or the other. The council of Leeds and Grenville, composed of reeves of the constituent units together with deputy reeves where

⁵²⁹ Leeds and Grenville council papers, 1854 (5); Petition of Mrs. Elizabeth Bird; Leeds and Grenville council minutes, 9 October 1854. In a later session Mrs. Bird was remitted £10 of rent due in consequence of persons crossing the ice and thereby evading tolls: Leeds and Grenville council papers, 1857 (1).

⁵³⁰ Leeds and Grenville council papers, 1865 (5).

populations justified a second representative, do not seem to have followed the nose-counting approach to decision making, for the number of signatures on one side or the other was not a reliable indicator of eventual success. More probably, availability of funds, the councillors' own knowledge of the petitioners, and partisan political or regional considerations would have been the governing criteria. This is borne out by the unpredictable fate of unopposed petitions.

Few of the toll lessees' remittance petitions were accepted. In their treatment of the toll-keepers the council was inconsistent, but the fact that requests were made so frequently is illuminating. Presumably the toll lessees and their supporters felt that a waiver of contractual terms was worth the attempt, and that mercy in enforcement, if not the duty of council, was at least not an improper factor in the exercise of official discretion. This perception is reinforced by the number of purely charitable petitions entertained, raising several questions. If Victorian individualistic morality made for tight-fistedness in municipal public assistance, as the literature informs us was the case, why were these claims made so regularly?⁵³¹ Why were such appeals often successful at the town, township and village level (as the records of the Town of Brockville, townships of Augusta, Front of Leeds and Landsdowne, Rear of Leeds and Landsdowne, and the village of Gananoque attest) but rarely at the counties level?

The council of the United Counties of Leeds and Grenville, when faced with a petition for charity, invariably responded that they had no power to make such a gift. Because the council tended to be careful with money, this may have been merely an excuse. David Murray takes this position concerning the many petitions for charity to the Quarter Sessions of the Peace in the Niagara District in the period 1841-9.⁵³² However, from a legal point of view, this response had a

⁵³¹ See, for example, Speisman, "Munificent Parsons and Municipal Parsimony." David Murray also finds that the repeated refusals of Quarter Sessions in Niagara to grant aid to the distressed and their sponsors did not stop these requests; Murray, *Colonial Justice*, 107-30.

⁵³² Ibid.

certain validity. There was nothing in the act that said that a county could not grant aid, but nothing that said it could, and as a corporation in the shadow of a law as restrictively interpreted by the courts and/or by doubt-fostering manual writers, the council may have been reasonable in preferring to err on the side of caution. It may also be that the ‘cultural baggage’ of the English settlers regarding parish rather than county poor relief was long lasting.⁵³³ According to the Finance Committee to which one such case was referred, subsidiarity (to use an admittedly anachronistic term) was the governing principle for welfare: “under the existing laws it is the duty of every [first level] Municipality to provide for their own destitute.”⁵³⁴ This did not mean the request would ultimately be denied. As will be discussed in Chapter 7, the Leeds and Grenville townships of Augusta, Front of Leeds and Landsdowne and Rear of Leeds and Landsdowne were accustomed to granting money to or for township residents in “embarrassed circumstances.”

In situations in which the Leeds and Grenville Council did have express or implied jurisdiction to act, as for instance in granting reductions to its contractual partners, the councillors seem to have been guided to a considerable degree by fiduciary principles and perhaps as well by political reality; careful guardianship of public money was clearly a valued goal. Indeed, an annual balanced budget was a legal as well as a political imperative. Yet it is noteworthy that the councillors were least concerned with the toll-keeper lessees’ hardships when the corporation itself was in financial difficulties and most lenient when the toll roads had

⁵³³ See generally George Emery and J. C. H. Emery, "The Premier versus the Aristocrat," *Ontario History* 100, no. 2 (2008): 178-204.

⁵³⁴ Leeds and Grenville council papers, 1866 (2a) 24 January 1866, First report of the Finance Committee. Technically this was incorrect: by this time first level municipalities had the power to provide poor relief, but not a duty in the legal sense.

been transferred to the townships. Even then, however, they were selective in their mercy and did not hesitate to sue those defaulters whose reasons for breach of contract seemed shakiest.

Council occasionally granted money to charitable appeals that did not come directly under the category of poor relief. Unsurprisingly, some direct assistance went to local residents, such as victims of fire in the township of North Crosby, counties residents who had volunteered to fight the Fenians, and the families of these volunteers. Some assistance of potential indirect benefit to the counties was also granted to recipients outside the jurisdiction; for instance, aid to sufferers of major fires in Carleton County and St. John, New Brunswick, may have been made on the assumption that there would be help back from these jurisdictions or others if ever needed.⁵³⁵ The counties also provided aid seemingly as a rough *quid pro quo* to institutions outside their jurisdiction which accepted counties' residents, such as the school for the Deaf and Dumb in Hamilton, the Marchmont Home in Ottawa (of which a local luminary was a founder and sponsor), and the Protestant General Hospital in Carleton County.⁵³⁶ However, some charitable grants seem to have been wholly philanthropic, such as aid to the "distressed operatives" of Lancashire, England.⁵³⁷

In the latter part of the period, the council, while still retaining the reactive petition-initiated process for awarding many of its grants, began to move toward a more proactive model, especially with regard to infrastructure and education. During the 1860s the practice first began to change with regard to bridge and road repairs; requests for grants for these purposes were no

⁵³⁵ Apparently a not uncommon practice, then as now: see Peter De Lottinville and John C. Weaver, "The Conflagration and the City: Disaster and Progress in British North America during the Nineteenth Century," *Social History/Histoire Sociale* 11 (1980): 417-49.

⁵³⁶ The Marchmont Home was founded by local worthy Billa Flint: see Larry Turner, "Flint, Billa" *Dictionary of Canadian Biography*, http://www.biographi.ca/en/bio/flint_billa_12E.html.

⁵³⁷ The Lancashire Cotton Famine (1861-1865) prompted an empire-wide relief effort. See *Report of the American International Relief Committee for the Suffering Operatives of Great Britain, 1862-63* (New York: C. A. Alvord, 1864); Leeds and Grenville council minutes, 16 October 1862.

longer entertained, and a pre-determined amount was divided equally among the townships. Exceptions were considered, but usually only if there was matching assistance from either the lower municipality where the road or bridge was located, or an individual. This tack was also taken when the council was approached by neighbouring counties for funds for an inter-county road or bridge.

On one occasion this approach was stymied by the law, at least initially. Informed by its solicitor that the counties were legally responsible for the repair or replacement of a major bridge at Gananoque, the council used the threat of placing tolls on the new bridge until it had been fully paid for to force the village council to agree to certain concessions: firstly that the village would pay the counties ten instalments of \$1,500.00 toward the cost, secondly that the village would undertake to maintain the bridge henceforth, and finally that the village council would obtain a private act from the legislature to ensure that they would not be able to renege on the settlement.⁵³⁸

The line taken in this latter period with respect to grants to local school boards was more carrot than stick, but equally effective. Beginning in 1870, the council made it a policy to pay half the cost of each of the counties' high schools every year (the province paid the other half), but only on condition that the schools would be free to students.⁵³⁹ That councillors preferred value for their philanthropy is also apparent in the debates over whether or not to build a House of Refuge or House of Industry near the end of the period. A special committee was dispatched

⁵³⁸ The negotiations dragged on through 1875 and 1876, as the Gananoque council was slow to hold up its end of the bargain. Leeds and Grenville went to the lengths of tendering a contract for the erection of a toll-gate before the village council finally conceded to the counties' terms. The cost to the counties of the victory was not negligible: as well as paying for the new bridge it was necessary to buy out a prior contract to maintain the old structure.

⁵³⁹ Leeds and Grenville council minutes, 27 January 1850. Originally the counties paid \$150 to each high school, an amount that rose gradually throughout the rest of the period. See Gordon Darroch "Scanty Fortunes and Rural Middle-Class Formation in Nineteenth Century Rural Ontario" in *Canadian Historical Review* 79, no.4 (1998): 621-56. Darroch argues that the middle class near-homogeneity of the Victorian Ontario rural communities explains their high degree of support for education (655).

to research the issues of how many were destitute in the counties, what it would cost for a site and to build a “poor house,” how such institutions operated “in Canada and the United States” and what the annual cost of maintenance would be.⁵⁴⁰ On the committee’s report that there would be no savings guaranteed by moving to an institutional model, the council determined to continue with outdoor relief provided by the townships.⁵⁴¹ There was no suggestion that poor relief was not an appropriate use of taxpayer money, but clearly accountability was a competing value.

Negligence Claims

Leeds and Grenville councillors, conscious of the issues of road ‘passability’ that concerned their constituents, also showed an increasing attention to safety throughout the period, possibly due to awareness of the negligence and nuisance cases reviewed in Chapter 3. Settlement of tort claims against a municipal corporation could be a drain on municipal resources, and one for which it was impossible to budget. In an article, “Municipal Compensation Cases: Toronto in the 1860s,” urban historian Eric Jarvis puzzled over the phenomenon of apparent municipal generosity to injured claimants, but failed to distinguish between the compromise of a potential civil suit against the municipality and acceptance of run-of-the-mill appeals from the destitute.⁵⁴² Admittedly, the Toronto claimant/petitioners themselves may have been nonchalant about the distinction, but the city council, its clerk and its solicitors seem to have been wary about creating a precedent: Jarvis notes a practice of awarding money in some instances while expressly

⁵⁴⁰ Leeds and Grenville council minutes, 12 November 1878. At the same session a resolution was passed to request the Legislature to compel every county to have a poor house: see Chapter 8.

⁵⁴¹ Leeds and Grenville council minutes, 6 February 1879.

⁵⁴² Eric James Jarvis, "Municipal Compensation Cases: Toronto in the 1860s," *Urban History Review* 3 (1977): 14-23.

disclaiming responsibility. Probably these were ‘without prejudice’ type settlement offers made on the advice of counsel.

Only two negligence claims were presented to Leeds and Grenville council during this period. In the first case the petitioner simply dropped the claim after he was turned down by council.⁵⁴³ In the second, the plaintiff bypassed the petition stage and brought his claim to court directly.⁵⁴⁴ Perhaps he felt it was likely to be considered undeserving by council on the merits, for political reasons, or due to the large amount claimed, \$2000.00 plus costs.⁵⁴⁵ The claim was to be a source of some anxiety for the council and its solicitors over several sessions. William Henry Wilkinson, acting under a power of attorney granted by Agmond D. Roe, alleged that a pile of earth and stones on the Victoria macadamized road had upset a horse, a carriage, and Mr. Roe one night, damaging horse, carriage, Mr. Roe personally and Mr. Roe’s livelihood. As the facts were investigated it appeared that Mr. Roe’s claim for damages was not as strong as it might have been; it was discovered that he had been injured and lost his job before the date of the incident. Despite (or because of) interlocutory efforts by the counties’ solicitor and his agents, and a judge whose sympathies lay with the defendants, a jury awarded \$350.00 to the plaintiff. The council may have been wise to proceed to trial; the plaintiff’s offer to settle had been \$800.00. Still, the relative modesty of the award was no doubt of little consolation to

⁵⁴³ Leeds and Grenville council papers, 1850 (2).

⁵⁴⁴ Leeds and Grenville council papers, 1864 (2a).

⁵⁴⁵ It is difficult to say what percentage of the county levy this represented, as the Treasurer continued to use pounds, shillings and pence for years after other sums were presented as dollar figures. This was apparently decided on because the account books were set up for the old figures. Canada West moved to dollars in 1855, but former currency continued to be legal: see James Powell, *A History of the Canadian Dollar* (The Bank of Canada, December 2005), https://www.bankofcanada.ca/we-content/uploads/2010/07/dollar_book.pdf, 23. It was clearly a significant sum: a few sessions later the gaoler complained to council that \$200 per annum was an insufficient annual salary to offer to attract a good turnkey, a full-time position: Minutes, October session, 1866. See also Adam Shortt, “History of Canadian Metallic Currency” in *Money and Banking in Canada*, ed. E.P. Neufeld (Toronto: McClelland and Steward 1964), 116-31.

council: with the plaintiff's costs and their own legal expenses and disbursements the total bill came to \$1,435.00.⁵⁴⁶

If the prospect of civil litigation was not a sufficient encouragement to safety, Leeds and Grenville counties also faced ratepayer initiated court supervision, presumably by the indictment procedure referred to in Chapters 2 and 3. Twice the council received notices from the county engineer that he had been instructed to inspect a certain length of road or bridge by the county judge.⁵⁴⁷ The judge had found the road wanting in various respects and ordered that it be put in repair immediately or the counties would face the statutory penalty. That these incidents had an impact on the corporate consciousness is indicated by the wording of the Roads and Bridges Committee reports; the words 'parapet' and 'approach' never appear before they were used in these notices, but crop up with reasonable frequency thereafter. Somewhat spitefully, the council refused to pay the engineer's accounts for the inspection in both these cases; these were paid by the provincial government or not at all. In like fashion, unhappy with the outcome of the Roe lawsuit, the council vented its ire on the special committee appointed to conduct the defense and the lawyers retained. They expressed the (vain) hope that some way could be found to pay the county solicitors a fixed annual fee whether their services were required or not, in order to avoid such uncontrollable blips in future budgets.⁵⁴⁸

Contracts

The frustration of council with the results in the Roe case is understandable. When one reads the years of documents generated by a constant struggle with road repair it is easy to appreciate the

⁵⁴⁶ Leeds and Grenville council papers, 1863 (5), 1864 (2a), 1864 (3).

⁵⁴⁷ Leeds and Grenville council papers, 1858 (4). I have not been able to find this order

⁵⁴⁸ Leeds and Grenville council papers, 1864 (2b).

councillors' feeling that they were doing all that was reasonably possible. Given the technology of the time, resources, state of development of the counties, geography and climate, no government could have achieved perfection.⁵⁴⁹ Yet it would not be accurate to say they did all they could. Rather, they did what they could, given their stubborn preference for a system of contracting by tender, a process which may have encouraged both parties to be impractical. Early in the period, county surveyor Thomas Hume advised that a salaried overseer be employed with hands hired by the day. Accepting Hume's proposal might not have saved the corporation from the threat of negligence claims and indictments, but it might well have reduced headaches and administrative and legal costs.⁵⁵⁰ In effect, the counties exercised their agency by declining to experiment.

Since the days of the Johnstown District Council, the tender and contract system had been the preferred practice. The counties contracted out almost all road work (statute labour under overseers was usually confined to roads of the subsidiary municipalities). Some money might be advanced for materials, but payment for the project was held back until the result was approved by council or its representatives. Previously the district warden had performed this function. In 1850 road commissioners were appointed, one set for each of the four county roads the counties had determined to macadamize. Commissioners, usually members or former members of council, would have the roads surveyed, and then would "let out" the road building to independent contractors. The commissioners were remunerated for the letting out process and

⁵⁴⁹ On the difficulties experienced by nineteenth century road builders in Upper Canada see Derek Murray, "'Equitable Claims and Future Considerations: Road Building and Colonization in Early Ontario, 1850-1890," *Journal of the Canadian Historical Association / Revue de la Société Historique du Canada* 24, no. 2 (2013): 156-88; Andrew F. Burghardt, "Some Economic Constraints on Land Transportation in Upper Canada/Canada West," *Urban History Review* 18, no. 3 (1990): 232-36; Michael S. Cross, "The Stormy History of the York Roads, 1833-1865," *Ontario History* 54, no. 1 (1962): 1-24; Christopher Andreae, "Narrow Gauge Through the Bush," *Ontario History* 100, no. 2 (2008): 242-44.

⁵⁵⁰ Leeds and Grenville council papers, 1851 (3).

approval. Municipal contracts were all in writing, and the road contracts involved a considerable degree of formality and customization. The practice for other contracts varied; toll contracts after 1856 used printed standard forms drafted by the county solicitor.⁵⁵¹ Other small contracts, for printing for example, were handled by the clerk in his free-lance capacity, probably with the help of a precedent book.

Legal sociologist Stewart Macaulay has suggested that the greater the bargaining power differential between contracting parties, the more likely the relationship will be reduced to written contractual form, and the less likely the contract will ever be tested by litigation.⁵⁵² Certainly this seems to have been true of the Leeds and Grenville contracts during this period. The road contracts were drafted to give the contractor very little power in the relationship; if he failed to meet his schedule for completion, the contract provided that the counties could hire another contractor in his place at his expense or the expense of his sureties. He might be paid either wholly or partly in municipal debentures at the council's discretion, rather than cash. The road contracts also provided for liquidated damages so that the quantification of defects or non-completion would not be open to consideration by a judge or jury. In the early fifties the contracting process was especially one-sided in favour of the council: if the lowest tenderer objected to the corporation's terms, there was no negotiation. The commissioner merely moved on to the next lowest bid. Perhaps due to painful experience, later contracts showed more concern for terms that were likely to be achievable. Nonetheless, it was perhaps fortunate for the council that none of the road contracts was litigated. The commissioners often contracted in their

⁵⁵¹ Leeds and Grenville council papers, 1856 (5), 1860 (3).

⁵⁵² Stewart Macaulay, "Non-Contractual Relations in Business: A Preliminary Study," *American Sociological Review* 28, no. 1 (1963): 55-67.

own names and without the use of the corporate seal, which might have rendered the contract void or voidable.⁵⁵³

Despite the efforts of the commissioners, or perhaps because their priorities were saving money and forestalling litigation and not building good roads, the counties' roads remained a mess, as did their management. The mandamus application brought by Augusta Township against the United Counties noted in Chapter 3 rose out of the poor state of one of the county roads.⁵⁵⁴ Contractors petitioned for more money, having lost out on the exchange of debentures or through inexperience in anticipating costs. In 1855 the council tried another dubious tack, contracting with one of its own members. This was against the law, but most likely an innocent mistake. The agreement provided that the councillor, one Robert Peden, would take over all four county toll roads for a period of thirteen years, putting each into a state of "perfect repair." In exchange, Peden would receive all the tolls for that period.⁵⁵⁵

As Thomas Hume might have predicted, this arrangement was extremely short-lived. First, Peden's conflict of interest resulted in "agitation" to be "fomented" against him.⁵⁵⁶ He left council in 1857, to return after his series of contracts had been terminated and a by-law had been passed on the advice of the county solicitor to ratify the illegal act. Secondly, the lack of clarity of terms and various omissions caused problems of interpretation, particularly relating to tolls, such as: could council change the location of or rate of tolls? Who would bear the loss if a toll

⁵⁵³ But see Risk, "The Nineteenth Century Foundations of the Business Corporation in Ontario." Risk states that there was some movement in the courts during the union period to provide exceptions to this rule. The first was for routine contracts in the course of business for which the corporation was created where value had been received. A second exception for contracts for authorized purposes was rejected by the Court of Error and Appeal in 1860 (284).

⁵⁵⁴ Leeds and Grenville council minutes, January 1855. Council first sought (and was granted) a stay, then on payment of costs and the approval of Augusta Township to plans for remediation (through the contract with Robert Peden) the township dropped the application.

⁵⁵⁵ Leeds and Grenville council papers, 1855 (5), 12 October 1855. Peden was mayor of Brockville at the time. He was elected warden of Leeds and Grenville (by council) in 1852 and 1853.

⁵⁵⁶ Leeds and Grenville council minutes, 2 February 1856: a motion of approbation for Peden won by a margin of one vote; Papers, 1857 (3), letter from Robert Peden, 17 November 1857.

house burned down? Who was to clear the roads of snow? All of these questions were referred for legal advice. Finally, and most importantly, Peden ran into the usual problem of running behind schedule and out of money.

In consequence of these problems, a new contract, apparently the first municipal contract to be professionally drafted in Leeds and Grenville, was entered into between the corporation and the former councillor, at the latter's expense.⁵⁵⁷ The term was extended to fifteen years and Peden was bound to remove the snow. Still, the longer period did not solve the difficulties of the initial capital outlay required and Peden's inability to raise the money. In 1858 council passed a by-law to loan Peden £2000, only to be met with a order from the Court of Common Pleas to show cause why the by-law should not be quashed for illegality on the ground that a public loan was being made to a private individual.⁵⁵⁸ The loan was eventually allowed to stand, but on January 28, 1859 a letter from the beleaguered contractor was received by the clerk stating that he was impelled to repudiate and would leave the matter of reimbursement for work done to date in the hands of council, "knowing that you will do what is just and right."⁵⁵⁹ According to previously sought advice from solicitor A. N. Richards, the council was compelled to settle or face a *quantum meruit* claim. Peden asked for £9089, being £15, 389 expenditures, less £4000 tolls received, less the £2000 loan, and charging £500 for his services. Council counter-offered £8200 payable in instalments, which offer Peden accepted.⁵⁶⁰

⁵⁵⁷ Leeds and Grenville council papers, 1856 (5), letter from Richard Steele to Roads and Bridges Committee, 1 March 1856, contract between the United Counties of Leeds and Grenville and Robert Peden, 7 March 1856.

⁵⁵⁸ Leeds and Grenville council papers, 1858 (4). In the Court of Common Pleas, Hilary Term 21st Victoria, in the matter of Richard Coleman the Younger and the Municipal Council of the United Counties of Leeds and Grenville, (A.N. Richards acting for Coleman) 4 February 1858 (apparently unreported.)

⁵⁵⁹ Leeds and Grenville council papers, 1858 (2), 3 October 1858.

⁵⁶⁰ Leeds and Grenville council minutes, January session, 1859. The debate regarding the buy-out of Peden's contract was acrimonious, but the settlement eventually passed by seven votes.

The lesson that road building was a losing proposition was long in the learning for local entrepreneurs. Even before the second contract with Peden was formally terminated, a tender by Thomas Wood had been accepted in principle. Wood's contract lasted only until June, 1861, when he also petitioned to be released. Later he accused the council of forcing him to give up the road business by their insistence on adhering to the letter of the contract and their decision to release no funds in advance of results, thereby causing him to lose his credit with suppliers and subcontractors. Wood further complained to the councillors that their lawyer had drawn the contract. He had objected to some of the wording and had been assured by the warden that no advantage would be taken of him; further, he had not known what was meant by 'repair.' His plea to the council "as it was then constituted" was unsuccessful, as was his claim to be reimbursed for material left on the road. Apparently, he had forgotten that his request for release had offered supplies on hand to the corporation, but the council had not, and held him to his own terms.⁵⁶¹ Undaunted, Wood and a partner applied for a new contract but were refused. A compromise suggestion similar to that put forward by Hume was advanced by one of the road commissioners (the office had been revived on Wood's release) to the effect that council enter into a series of "small contracts" under the supervision of a salaried overseer, but the councillors chose instead to download all responsibilities for building the four roads to the townships.⁵⁶²

As noted above, contracts to regulate tolls and toll-keepers also posed problems. Councils were continually bombarded with petitions to relieve toll-keepers of the consequences of their bad bargains. Collusion by toll-keepers with toll-breakers was suspected in some instances. A low tender might be accepted, but when the toll-keeper could not arrange a surety, the tender

⁵⁶¹ Leeds and Grenville council papers, 1861 (2), 1861 (3) 1861 (4), 1862 (1), 1862 (2a).

⁵⁶² Leeds and Grenville council papers, 1862 (2a). On October 16, 1862 the Roads and Bridges Committee report recommended that the county solicitor be requested to draft a by-law to transfer the roads back to the townships from which they had been assumed.

would fall through and the process would have to be repeated. Moreover, toll-keepers became wary with experience. Roads and Bridges committees reported difficulty getting tenders for some of the tolls, and were eventually “forced” to hire a salaried keeper. It is unclear why this was considered so unfortunate, but it does show the strength of their dedication to the contract system.

Nor were the contracts for printing devoid of problems. Due to the statutory requirements for notices for various types of municipal action, printing was a constant item in the budget. At the beginning of the period council printing work was parcelled out to a favoured few who shared the amount appropriated among them, but, perhaps as a part of a drive to public probity or parsimony, printing contracts also became part of the tender system. The results of this change were as might be expected; the lowest bidder would win the contract, then petition for more money. Opined David Wylie, proprietor of the *Brockville Recorder*: “[i]t is impossible to tender for the whole work justly. Either council would be cheated or the printer. If the printer is the victim, council would be petitioned for more as has frequently been the case.”⁵⁶³ The only just and honest way to purchase typeset, he explained, would be to pay a unit price. That way the council would pay only for work done, but the printer would have the advantage of knowing for what he was contracting. Council was unwilling to give up the budgetary certainty that a fixed price for all annual printing needs allowed, but did permit Wylie to inspect the written material in the clerk’s office to be printed before submitting his tender.

⁵⁶³ Leeds and Grenville council papers, 1866 (5), Letter from David Wylie, 19 January 1866. Wylie had some experience in municipal matters. He was a long-time member of the Board of Education in Brockville. The next year, he began a stint as a Brockville Town Councillor, which position he held for the next five years. It seems likely that he felt a certain confidence dealing with the county council that his competitors may have lacked. See Thaddeus Leavitt, *History of Leeds and Grenville, Ontario, from 1749 to 1879* (Brockville: The Recorder Press, 1879), 149-50; <http://brockvillehistoryalbum.wordpress.com/tag/brockville-recorder/>. One of Wylie’s chief competitors was John McMullen of the *Monitor*, who often underbid him but whose contracts were rarely accomplished without problems.

Even when written contracts with attached specifications clarified areas of misunderstanding (such as who would supply the paper), the contractual relationship with printers could be frustrated by unanticipated events, such as the Fenian threat of the mid-1860s. When the Fenian scare hit, council felt obliged to pay an additional amount to a contractor to take the printing to be done out of Brockville. This additional payment had the incidental effect of raising the price over that of the next lowest bidder, and also resulted in the very financial uncertainty that the council was seemingly trying so hard to avoid.

Contracts for the lease of counties property, which occasionally required both legal advice and legal action, were another repeating item on the agenda of council sessions. One lease in particular was the cause of much deliberation almost throughout the entire period. A former Johnstown District property (the old court house) had been let at what had been or had become a nominal rent to the highly connected Hon. James Morris, years before the Municipal Act gave the right to manage county property to the county council.⁵⁶⁴ This arrangement was particularly irksome to the council, possibly for partisan political reasons, but clearly also for financial ones, when their efforts to cancel the lease or at least charge fair market value were stymied by the Crown Lands Office, the nominal landlord. After years of protest and an unsuccessful trip to court, negotiations finally resulted in an agreement by the province that council could let the property to the Township of Edwardsburg at a more favourable rate.⁵⁶⁵ When the Edwardsburgh Township Council agreed to buy the property a few years later, legal advice was sought, and

⁵⁶⁴ *Leeds v. Morris* was heard in the Division Court. The counties lost. As it was found the *lis* was due to the fault of the crown, no costs awarded were awarded: Leeds and Grenville council papers, 1861(5). See also P.G. Cornell, "Morris, James," [http://www. Biographi.ca/en/morris_james_9E.html](http://www.Biographi.ca/en/morris_james_9E.html)

⁵⁶⁵ Leeds and Grenville council minutes, January 1867: the rent was \$10 a year.

several years later instructions were given to the lawyer to seek a private act to allow the transaction, which finally put an end to the issue.⁵⁶⁶

Arbitration

Some Leeds and Grenville contracts called for arbitration in case of dispute, but this does not seem to have been resorted to in the case of many contracts that went awry. As we have seen in the cases of Messrs. Peden and Wood, the council preferred to renegotiate or just cancel the contract. Since payment was withheld until the work was complete, there was no incentive to arbitrate on the part of the council. Other arbitrations were mandated by statute. The Municipal Acts stated that arbitrations were to be held in cases of expropriation by a municipality where the value of the land was in issue, and in division of public debt (as on secession). Each party was to notify the other of his or its claim and choice of arbitrator, and the two arbitrators together appointed a third. Although framed in imperative language, the Leeds and Grenville council do not seem to have interpreted these provisions as forbidding prior negotiation.⁵⁶⁷ Thus, when the Town of Brockville withdrew jurisdictionally from the United Counties, the legal expenses for Leeds and Grenville were \$110.00, which sum included representation and negotiations well as “drafting the award.”⁵⁶⁸ The fact that the arbitration agreement with Brockville broke down, resulting in an (unsuccessful) suit brought by Brockville against Leeds and Grenville in the Court of Chancery, with concomitant legal expenses, may also have soured the council on this process. Some years later, when the Town of Prescott sought to follow suit, the United Counties’ council

⁵⁶⁶ Leeds and Grenville council minutes, January, 1877: the price was \$200. The decision to sell to Edwardsburgh had been made five years earlier: Leeds and Grenville council minutes, November 1872.

⁵⁶⁷ The imperative language suggests that these arbitrations were not seen as an alternative to litigation, but rather as a routine quasi-bureaucratic process.

⁵⁶⁸ Leeds and Grenville council papers, 1859 (1), 11 October 1859.

was so determined to avoid arbitration that they decided that the Prescott offer was “close enough” to their own idea of what was acceptable.⁵⁶⁹

For a while after the passage of the Baldwin Act, Leeds and Grenville appeared to prefer arbitration over negotiation when expropriating land, but by the end of the period the council had returned to the Johnstown District practice of allowing road commissioners to negotiate private settlements. Since it was the commissioners who seem to have acted as the council arbitrator on a regular basis in any event, this may not have made much difference to the sums paid, though it saved on the fee to the third arbitrator. Costs of arbitration, although not high in absolute terms, may have been prohibitive in relative terms; some awards show the costs as greater than the actual award. In some cases, no money changed hands except to pay the arbitrators. This could be the case, for instance, if an old road allowance was exchanged for a new one. In these cases Leeds and Grenville paid the entire cost of the arbitration.

The Leeds and Grenville council papers contain a number of such arbitration awards, many with seals, oaths of the arbitrators and affidavits of execution. Unfortunately for the historian, such formality was observed in most of these that the boiler-plate reveals little more than the participants’ penchant for legalism. A few of the awards, however, are more casual and therefore more instructive. One such shows the method used by at least that set of arbitrators.⁵⁷⁰ Thomas Robertson, a township clerk acting for the counties, Allan Hunter, a road commissioner acting for Andrew Smail, ratepayer, and J. MacMillan, the independent arbitrator chosen by

⁵⁶⁹ Leeds and Grenville council papers, 1868 (3).

⁵⁷⁰ Leeds and Grenville council papers, 1854 (1), award to Andrew Smail, 15 April 1854. Mr. Smail wrote to the council that he had been “informed by Allan Hunter” that this was the only way he could get damages, and that he was therefore requesting an arbitration and appointed Mr. Hunter: Leeds and Grenville council papers, 1854 (1), 8 February 1854.

Robertson and Hunter, met at the site and decided the value of various facets of the loss to Smail as follows:

TABLE 3: ARBITRATION AWARD CONCERNING EXPROPRIATION LOSS OF ANDREW SMAIL

	T.Robertson	A.Hunter	J.MacMillian
Allowed for fencing a lane (18 rods)	13.10	13.10	13.10
Loss of land for lane	9	6.10	5
Allowed for inconvenience [sic] of distance from road	20	30	15.10
Deducted for advantages by drainage of new road	17.10	0	0
Totals	20.50	50.00	34.00

Faced with the (extreme) discrepancies among the values, the arbitrators accepted MacMillian's figures and awarded Smail £34 plus costs. As for the loss of land for the road itself, it was agreed by all that this would be compensated by the granting of a deed for the old road. As observed previously, it is difficult to tell whether other awards followed the Smail pattern. Few seemed to have recognized "inconvenience," or if they did, they did not note it.

In the Leeds and Grenville council papers for 1857, a document apparently in the hand of county clerk James Jessup marked "Instructions" sets out rules for arbitrators, based on statutory provisions.⁵⁷¹ Among these is a prohibition against awards for anything other than real property, such as fencing, an admonition that if the advantage was to the counties the award should be in the counties' favour, and a further warning to make sure the land holder provided proof of ownership.⁵⁷² For some time fencing did disappear as an item in the awards, but no arbitration gave the award to the county, in spite of the fact that proximity to the road was likely to have

⁵⁷¹ Leeds and Grenville council papers, 1857 (1): 12 Vic. c.81 s.197. A reference to 16 Vic. c.181 s.33 is crossed out.

⁵⁷² Leeds and Grenville council papers, 1857 (1).

been worth more than the land taken in at least a few instances. As well, as arbitrators grew more seasoned, or as land values became more settled, fewer cases included a third arbitrator. Again, as the clerk remained vigilant about other statutory requirements regarding notices back and forth, it must have been felt that this common sense approach was within the spirit of the law, albeit outside the letter.⁵⁷³

Bureaucratic and Legal Assistance

The importance of municipal bureaucrats James Jessup, the county clerk throughout most of this period, and his financial counterpart, Treasurer James Lancaster Schofield, who also held office during most of this time, is evident throughout the records. They were paid by salary, whereas other officers were paid on a fee-for-service basis. The report of a survey drawn up by the Frontenac County Council in 1869, to which twenty-six counties responded, shows that Leeds and Grenville paid the most per dollar of assessed value of any of the responding jurisdictions to its treasurer, \$300 over the next highest spending county.⁵⁷⁴ For the office of clerk, Leeds and Grenville was second in expenditure, paying \$200 less than did the much more populous and wealthier County of York. The treasurer was also required to post ‘bail’ or sureties for faithful performance, the financial responsibility for which the council chose to assume.⁵⁷⁵ Nevertheless, it would appear that Leeds and Grenville councillors felt they received value for their money: neither officer had his remuneration reduced after the lower salaries paid by the other counties were discovered. The minutes of the Townships of Leeds and Landsdowne Front and Rear show

⁵⁷³ Notations indicate Jessup often returned defective notices with instructions on how to correct them.

⁵⁷⁴ Leeds and Grenville council papers, 1869 (5) 8 November 1869, replies to circular of September 26, 1869. Twenty-six counties reported. York County paid its Treasurer \$1400 per year, and its clerk \$900. Lambton County paid \$500 and \$350 respectively.

⁵⁷⁵ In 1864, for example, the Finance and Assessment Committee reported on a policy with the European Assurance Company for coverage of \$8000.00: Leeds and Grenville council papers, 1864 (2b).

a good deal of turnover in their respective staffs; that this was not the case at the counties level is probably because the value of a good bureaucrat was felt to be greater than any advantages arising from new opportunities to dispense patronage.

A layman who had been clerk to the Johnstown district Quarter Sessions, then to the Johnstown District Council, Jessup was the *eminence grise* of the county council until his death in 1876.⁵⁷⁶ He drew up the agenda and stage-managed proceedings of council by drafting motions with blanks for the names of mover and seconder to be filled in at the time of the meeting.⁵⁷⁷ Jessup also handled all correspondence and performed duties imposed by the legislature on the county generally, as well as on the clerk personally. He assisted with assessment rolls and supervised printing. In addition, he acted as Clerk of the Peace, for which service he was paid by the Attorney General's department, until lay persons were no longer permitted to fill this position.⁵⁷⁸ He also freelanced, preparing forms, returns and contracts for township and village clerks and others. His death in 1876 necessitated a special meeting of council; six applications were considered and Samuel Reynolds (a lawyer who was currently the clerk of assize) was appointed.⁵⁷⁹

James Lancaster Schofield directed council on financial matters. On his death in 1873 (which also necessitated a special meeting) he was replaced by his son, Frederick Schofield, who had acted as assistant treasurer on occasion.⁵⁸⁰ In his regular correspondence with the Finance

⁵⁷⁶ Scion of a local loyalist military family, Jessup became clerk of the peace for the Johnstown District Quarter Sessions in 1830: Frederick H. Armstrong, *Handbook of Upper Canadian Chronology* (Toronto: Dundurn Press, 1985), 278.

⁵⁷⁷ Usually the movers and seconders were the same people in each of the sessions.

⁵⁷⁸ Pursuant to *An Act for the Appointment of County Attorneys, and for other purposes related to the local administration of justice in Upper Canada* (1857), 29 Vic. c.59.

⁵⁷⁹ Leeds and Grenville council minutes, 8 December 1876; Leeds and Grenville council papers, 1875 (3b): letter from Reynolds to Jessup dated 31 March 1875 identified him as clerk of assize.

⁵⁸⁰ There was only one other candidate. Mr. Chapman, the Treasurer for Augusta, was nominated by the Reeve of Augusta but lost by seven votes: Leeds and Grenville council minutes, Special Meeting 9 July 1873.

and Assessment Committee Schofield advised as to the current and projected liquidity of the corporation, reminded council when their debentures were coming due and when finance and debt related by-laws were about to expire. He set out alternative courses of actions to be followed regarding the budget for the year, listing the advantages of each and urging belt tightening where possible. He also collected tolls from the toll-keepers, conferred with solicitors, directed legal action when necessary to enforce contracts and leases, and instructed the Sheriff in regard to the sale of lands for collection of back taxes. The latter task was a complicated one, fraught with legal pitfalls, especially in regard to non-residents, and Schofield feared the responsibility. Writing to the warden, he advised that they “employ some legal gentlemen of the town” to ensure that the taxes collected on wild lands would be unassailable.⁵⁸¹

An independent accountant hired to check the books in 1853 found Schofield’s system of accounts superior to his predecessor’s in all respects; indeed, he discovered the county was being undercharged by their treasurer.⁵⁸² However, the accountant also found that Schofield was intermingling private and public funds, contrary to legislation and common law. In consequence of this report the counties initiated the keeping of dedicated accounts. Ironically, Schofield later kept the counties afloat during the hiatus between payment of accounts and return of assessments by dint of his personal credit with the bank, a technical violation of the principle of private-public separation.⁵⁸³ Sporadically, special audits were called for to augment the required annual auditor’s reports. No serious defects were unearthed, but councillors excused themselves for the

⁵⁸¹ Leeds and Grenville council papers, 1854 (3), 26 January 1854.

⁵⁸² Leeds and Grenville council papers, 1853 (6), 5 December 1853, report of Walter Finlay. Finlay advised that the system of the former Treasurer, H. Buell, had been “irregular.”

⁵⁸³ Leeds and Grenville council papers, 1858 (2). Council expressed its thanks to Schofield for having used his personal credit in dealings with the Bank for the last three or four years.

cost of this extra vigilance as a deterrent against money being spent “in a loose and careless manner.”⁵⁸⁴

Every request by the treasurer or clerk for funds or clerical assistance seems to have been cheerfully granted.⁵⁸⁵ Other professionals, part-time assistants and temporary help were treated more shabbily, in keeping with the penny-pinching approach to contractual partners noted earlier. Similarly, other low law officials who were outside the purview of their patronage, but for whose workplace needs they were responsible, such as the county registrar, were also provisioned grudgingly. Often the invoices of these provincial appointees and officials were reduced by up to a third. Naturally, there were many complaints from the recipients at this cavalier treatment, but only one, who cited additional reasons, quit civic service.⁵⁸⁶ None seems to have considered legal action.

One group whose accounts were questioned by the council in the first few years were solicitors. For the first part of the period there was no official county solicitor. The first lawyer to appear in the council records is John Hillyard Cameron, by this time a leading member of the Toronto bar, who was consulted for an opinion on the Wild Lands Tax.⁵⁸⁷ Council also looked to the metropolis on a few occasions for legal opinions from another leading lawyer, Philip VanKoughnet.⁵⁸⁸ Once, after a disappointing answer from the latter on a question of how to tax

⁵⁸⁴ Leeds and Grenville council minutes, June 1879.

⁵⁸⁵ For instance, in 1854 the Finance Committee recommended Jessup’s salary be increased to £100 “due to the increase in statutes.” Leeds and Grenville council papers, 1854 (2), report of the Finance Committee, 21 June, 1854. On 9 November 1868 he wrote to the Warden, noting several years of service respecting assessments—preparing forms, superintending printing and distributing which was “not [his] duty by law” but which he undertook “to assure a correct and uniform system.” A raise was voted without discussion: Leeds and Grenville Council papers, 1868 (5). Schofield was originally paid according to the percentages set by statute.

⁵⁸⁶ Leeds and Grenville council papers, 1852 (7), 12 June: Thomas Hume resigned when his account was not paid, citing the “unprofitable situation” together with other reasons with which “it was unnecessary to trouble [the council.]”

⁵⁸⁷ Donald Swainson, “Cameron, John Hillyard,” *Dictionary of Canadian Biography*, http://www.biographi.ca/en/bio/cameron_john_hillyard_10E.html.

⁵⁸⁸ Bruce W. Hodgins, “VanKoughnet, Philip,” *Dictionary of Canadian Biography*, http://www.biographi.ca/en/bio/vankoughnet_philip_10E.html.

property in towns, they decided to get a local second opinion; Sherwood and Steele of Brockville provided an opinion identical to VanKoughnet's but "more clear" and less expensive.⁵⁸⁹ Two years later Sherwood and Steele were formally appointed county solicitors.⁵⁹⁰

Even when officially appointed, lawyers for the corporation were employed on an ad hoc basis, usually as crisis control, to advise or act on behalf of the municipality in proceedings threatened or taken against the council or one of its agents. Occasionally legal work was referred to A. N. Richards, but Sherwood and Steele of Brockville remained official county solicitors until R. F. Steele was appointed to the bench in 1868.⁵⁹¹ Steele was replaced by Herbert Stone Macdonald, who fulfilled the role until he too was given a judicial appointment in 1873.⁵⁹² The next county solicitor, W.S. Senkler, lasted only a year until he too became a judge.⁵⁹³ Senkler's successor, T. M. Brooke, seems to have been less distinguished and/or connected than his predecessors; he was a young man when appointed in 1874 and remained county solicitor at least

⁵⁸⁹ Leeds and Grenville council papers, 1854 (6), 1854 (7). VanKoughnet charged £7.10, Sherwood and Steele, £6.

⁵⁹⁰ Leeds and Grenville council minutes, January, 1856.

⁵⁹¹ Leeds and Grenville council papers, 1868 (5). A. N. Richards, himself later a distinguished politician, serving as member of the provincial legislature for Leeds and later as Attorney General of the Northwest Territories and Lieutenant Governor of British Columbia, was the younger brother of Sir William Buell Richards, first Chief Justice of the Supreme Court of Canada. See "Richards, The Hon. Albert Norton," PARLINFO (Parliament of Canada Website), <http://www.parl.gc.ca/parlinfo/Files/Parliamentarian.aspx?Item=74306bed-8848-4eaa-bfbc-52f41b63d3cb&Language=E&Section=ALL>; Steele's senior partner, George Sherwood, followed Ogle Gowan as warden of the counties in 1851. He then left municipal for provincial politics, and was eventually appointed County Judge of Hastings County in 1860. See Biography of Hon. George Sherwood, Q.C., *The Canadian Biographical Dictionary and Portrait Gallery of Eminent and Self-Made Men (Ontario Volume)* (Toronto: American Biographical Publishing Company, 1880) <http://www.accessgenealogy.com/canada/biography-of-hon-george-sherwood-q-c.htm>. The appointment was not accompanied by a monetary retainer.

⁵⁹² "Herbert Stone Macdonald," in *A Cyclopædia of Canadian Biography: Being Chiefly Men of the Time: A Collection of Persons Distinguished in Professional and Political Life: Leaders in The Commerce and Industry of Canada, and Successful Pioneers* (Toronto: Rose Publishing Co., 1888), 652.

⁵⁹³ W. S. Senkler had practised in partnership with J. D. Buell: *Upper Canada Law List* (Toronto: Rordans and Finch, publishers, 1862) <http://books.google.ca/books?id=nEoWAAAAYAAJ&lpg=PA130&ots=DqVri5JTk&dq=W.%20S.%20Senkler&pg=PA130#v=onepage&q=W.%20S.%20Senkler&f=false>. Like the Sherwoods, the Buells were a prominent local family, related to the Richards: see Ian MacPherson, *Matters of Loyalty: The Buells of Brockville, 1830–1850* (Belleville, 1981) and Ian MacPherson, "Buell, William" *Dictionary of Canadian Biography*, http://www.biographi.ca/en/bio/buell_william_1792_1862_9E.html.

until the end of the period.⁵⁹⁴ Perhaps council was content with the trade-off of a less prominent or experienced practitioner for greater stability in the role.

After 1858 all major Leeds and Grenville contracts were either drafted or reviewed by the county solicitor. Unsurprisingly, at about this time the counties began to pay their legal bills in full and without question and to scale back purchases of the municipal manuals discussed in Chapter 4. The council papers are full of publishers' pleas for subscribers to various guides and forms, and at the beginning of the period Leeds and Grenville councils were good customers of reference material. In 1851 they purchased 149 copies of Thomas Shenston's *The County Warden*, for their own use and to distribute to the town, townships and villages within the counties. In 1852, one copy of Hugh Scobie's *Municipal Manual* was purchased for each municipality, and the council also subscribed to Scobie's proposed *Municipal Almanac*. Eight new manuals were bought by council in 1859: two from Maclear publishing (probably Harrison's manual) and six from Thomson and company. That was their last major purchase of legal reference material for this period, although in 1864 they did buy one hundred and fifty copies of a guide that provided names and addresses of functionaries across the province.⁵⁹⁵ By the second half of the period Leeds and Grenville councillors seem to have found it safer and more cost effective to rely on their solicitors when in doubt.

A further significant source of information (and direction) was the provincial government. Every year council received copies of the Journals of the Legislative Assembly with appendices, one for each constituent municipality. Until confederation these were provided free

⁵⁹⁴ Brooke (or Brook or Brooks) was apparently never appointed to the bench in Ontario. He was twenty-seven years old in 1875. At that time had the approval of the Manager of Molson's Bank in Brockville, who recommended him to American firms in need of an agent in Leeds County: *Martindale's United State Law Directory for 1875-6* (New York: J. B. Martindale), 709.

⁵⁹⁵ Leeds and Grenville council papers, 1864 (5). George Gregg's *Municipal Guide* was an undated pamphlet published by the "Leader office" that provided pertinent and not-so-pertinent information. Among the latter: the ages of the officers and politicians listed.

of charge; thereafter the council paid. A steady stream of correspondence from various provincial departments arrived for the attention of the clerk and council; as we will see in the next chapter, much of that was considered a nuisance at best, and interference at worst, but no doubt at least some was useful, at least in managing or complying with the accompanying demands.

Conclusion

The law-related activities of the United Counties of Leeds and Grenville were myriad and diverse, and this chapter has just hinted at many of them. The municipal records show that the shadow of law was omnipresent. Although the council's actions were not always lawful in a strict sense, they were always legalistic. All corporate acts were ostensibly legitimized by by-laws, and only in the latter few years of the period did they begin to move away from the model of having each and every action and expenditure moved, seconded and debated by the "committee of the whole," even when part of an omnibus by-law.

Throughout the period the members of Leeds and Grenville Council relied on their clerk and treasurer to get things done, and done properly, and they were willing to pay relatively generously for this service. But while the council and its staff during this period referred continually to law and showed an appropriate awareness of and deference to legal form and substance, there is no doubt that they occasionally showed a certain nonchalance about both determining and complying with the letter of the law. Legal reference material was valued at the start of the period, but less so latterly. Solicitors were relied on more and more as time went on, albeit grudgingly at first, and always on an ad hoc basis. Legal conformity was an objective, but not the sole or over-riding one. When it appeared that the Treasurer was less than meticulous about legal rules, councillors were unfazed. They were comfortable with his scruples and

competence, and the wisdom of this tolerance was confirmed when his relaxed standards allowed them to piggyback on his personal credit. In a similar vein, statutorily mandated arbitrations were not flouted, but rather transformed into formalized negotiations, as the third arbitrator was dispensed with.

Though the council showed a readiness to use law and legal practices to facilitate their agenda, this did not always lead to success. The quasi-judicial petitioning system made for unbalanced and unplanned expenditure, and gradually began to be replaced, or at least supplemented, by pre-considered grants. Corporate law required contracts as well as by-laws for the corporation to act, and these were duly entered into, seemingly in good faith, though not always properly executed. But as standard forms gave way to professionally drafted contracts, it became clear that no amount of advice and documentation could make up for weaknesses in the underlying economic reality and the impracticality of the tendering process, as toll, printing and road contracts alike could not be sustained. That the council's legal position was strong in these contract disputes was cold comfort when their ultimate objectives could not be met. Nonetheless, the contractual mindset was resilient in the face of failure; rather than move to a bureaucratic model, they simply re-negotiated many of the smaller contracts and abandoned their lofty plans for major improvement of the county roads by downloading responsibility to the lower level municipalities.

The council did make use of the judicial system to press the counties' own claims, and were unable to avoid the claims of others, but deplored the concomitant costs even when they were successful. They preferred negotiation to judicial or arbitral process, a preference that strengthened over time. In their legal dealings, the council (or their staff and lawyers) showed a knack for extra-legal problem solving, as is evident in their ability to maneuver past their

statutory responsibility in the Gananoque bridge dispute by using another part of the law—their right to erect tolls—to force the village council to capitulate. Law was also employed as a reason for inaction, as in the decision not to fund welfare requests. In addition, the council made use of its spending power to achieve goals outside its legislative mandate, such the requirement that school boards make education free to pupils in exchange for grants from the municipality.

The problem of the Johnstown property is particularly illustrative of the ambivalent nature of the agency of the Municipal Corporation of the United Counties of Leeds and Grenville. High law and political circumstances were obstacles to the achievement of a discrete municipal objective—the effective exploitation of a resource. An additional complicating factor was the competing authority of the Crown Lands office, another governmental sub-unit with its own locus of power. Various modes of action were contemplated and attempted, and eventually, after a number of legal setbacks and considerable time, the goal was accomplished with the help of legal professionals.

The municipal corporation of the United Counties of Leeds and Grenville was undoubtedly ‘a creature of the province.’ The shadow of high law affected all matters of low governance. However, the council’s freedom to raise revenue beyond what was necessary to fulfil their statutory and common law obligations provided a modest space for local government initiative. With the help of staff and lawyers, using by-laws, contracts, and grants, the municipal councils of the United Counties of Leeds and Grenville were able to exercise agency, if not autonomy, in the pursuit of their agendas.

Chapter 6: Soft Law, Hard Law, and Supervision: Grand Juries, Prison Inspectors, and Local Government Autonomy in Canada West/Ontario, 1850-1880

Many years ago Willard Hurst and Harry Arthurs drew the attention of legal historians to the importance of legislative/executive and administrative/regulatory institutions in the socio-legal study of law. Their insistence on the centrality of non-judicial aspects of law in the nineteenth century common law world, though honoured more in acknowledgement than practice, is equally applicable to the sphere of low law.⁵⁹⁶ In this dissertation I argue that the high/low dichotomy should not be confined to the judicial facets of the legal system, and that municipal councils can be seen as ‘low legislatures.’ However, while the conceit of portraying law as ‘high’ or ‘low’ has incontrovertible value in drawing attention to the submerged nine-tenths of the legal iceberg, it should not be allowed to obscure the fact that, whether low or high, law is never reducible to a simple model.

When looking at the relationship of law and institutions of governance, another analytic duality, namely that of ‘hard’ and ‘soft,’ complicates the ‘law’ part of the low/high law concept. Simply put, ‘hard law’ is the law that is instantly recognizable to Western eyes as legal: positivist, monist, hierarchical, and coercive. ‘Soft law’ is non-coercive, communicative and cultural.⁵⁹⁷ As Anna di Robilant has put it, “Soft law...labels those regulatory instruments and mechanisms of governance, that while implicating some kind of normative commitment, do not

⁵⁹⁶ See for example, James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth Century United States* (Madison: University of Wisconsin Press, 1964), Hurst, *The Growth of American Law*; H. W. Arthurs, *"Without the Law": Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985).

⁵⁹⁷ See generally Anna Di Robilant, "Genealogies of Soft Law," *American Journal of Comparative Law* 54 (2006): 499-544, T. Gruchalla-Wesierski, "A Framework for Understanding Soft Law," *McGill Law Journal* 30 (1984): 37-88 and W. Witteveen and B. van Klink, "Why is Soft Law Really Law? A Communicative Approach to Legislation," <http://rechten.uvt.nl/bartvanklink/softlaw.pdf>.

rely on binding rules or on a regime of formal sanctions.”⁵⁹⁸ For some time much in vogue in the field of international law, these terms have had little impact on the thinking of legal historians outside the history of the *lex mercatoria*, the European international private law of trade, from which it has been claimed the soft law of the European Union and other non-state ‘transnational’ regulation descends.⁵⁹⁹ Yet the phenomenon is also discernible infra-nationally, in such otherwise legally difficult to classify institutions as the mid-Victorian Ontario grand jury in its non-judicial, supervisory mode.

The Upper Canadian grand jury was one of the received conventions of the common law, a fixture of criminal justice at the inferior courts of general (or quarter) sessions and in superior circuit courts of Oyer, Terminer and General Gaol Delivery (commonly known as the Assize, or Assizes).⁶⁰⁰ In the criminal law sphere, while guilt was determined by a petit jury, grand juries reviewed proposed prosecutions to determine which should proceed to trial. In addition, grand jurors commented on political issues and lobbied for reforms by means of a general report called a ‘presentment.’⁶⁰¹ They also regularly presented on matters of local governance, such as the condition and administration of facilities such as the court house, local roads and bridges, and particularly the district gaols.⁶⁰² Peter Oliver has written on the proclivity of Upper Canadian

⁵⁹⁸ Di Robilant, "Genealogies of Soft Law," 500.

⁵⁹⁹ Gunther Teubner, "Global Bukowina: Legal Pluralism in the World Society," in Gunther Teubner ed., *Global Law without a State*, ed. Gunther Teubner (Aldershot; Brookfield: Dartmouth, 1997), 3-28.

⁶⁰⁰ For a chronology of changes in the Ontario courts see Banks, "The Evolution of Ontario Courts, 492-572.

⁶⁰¹ For the political use of the grand jury in pre-revolution America see Marvin E. Frankel and Gary P. Naftalis, *The Grand Jury: An Institution on Trial* (New York: Hill and Wang, 1977), 10.

⁶⁰² The Hon. R. I. Ferguson attributed the gaol investigation function to the grand jury's role in general gaol delivery: R. I. Ferguson, "The Grand Jury," *Criminal Law Quarterly* 5 (1862-3): 210-219. See also George John Edwards, *The Grand Jury: considered from an historical, political and legal standpoint, and the law and practice relating thereto* (Philadelphia: G.T. Bisel, 1906); J. Van Voorhis, *Note on the History in New York State of the Powers of Grand Juries* (Albany, N.Y.: Albany Law School, 1962), 13, on the conduct of local supervision of accounts and infrastructure in the United States. See also W. A. Clarke, ed., *The Grand Jury Recommend: a Selection of Entries in the Restigouche Grand Jury Book 1858-1877* (Dalhousie, N.B.: Restigouche Regional Museum, 1995) for a collection of presentments by grand juries in nineteenth century New Brunswick. Other works on grand juries include Richard D. Younger, "A History of the Grand Jury in the United States" (Ph.D. dissertation, The University of Wisconsin - Madison, 1954), Sidney N. Lederman, *Study of the Civil Jury and Grand Jury in*

grand jurors in the early part of the nineteenth century to chastise the justices of the Courts of Quarter Sessions by presentments on the state of district gaols that fell below what the jurors felt was an acceptable standard.⁶⁰³ But except for their duties in the approval of indictments—at both the sessions and assizes—and their responsibility to determine the eligibility of ‘lunatics’ for poor relief at sessions, grand juries in the pre-Municipal Act period operated as a purely ‘soft’ institution, for whose strictures there was no enforcement.

While the courts of quarter sessions survived, professionally trained county judges took over their leadership from the amateur justices of the peace, and even their criminal jurisdiction narrowed and diminished.⁶⁰⁴ As for the venerable institution of the grand jury, it came under attack by those who considered its role in the criminal justice system to be an offence to principles of modernization, professionalization, and Benthamite rationality.⁶⁰⁵ Blake Brown has argued that the importance of the jury in British legal ideology seems to have helped shield the Canada West/Ontario grand jury from reform.⁶⁰⁶ It might be expected that the grand juries’ ‘soft’ supervision of local government operation of correctional facilities would have been unprotected

Ontario: Prepared for Ontario Law Reform Commission (Ontario Law Reform Commission Toronto, 1971); Frankel and Naftalis, *The Grand Jury: An Institution on Trial*; Donald Fyson, “Grand Juries, Political Power and Citizenship in Quebec and Lower Canada, 1764-1830,” a paper for the 77th annual meeting of the Canadian Historical Association vol. Ottawa, 1998, <http://www.hst.ulaval.ca/profs/dfyson/GJ.htm>., expanded as Donald Fyson, “Jurys, Participation Civique et Representation au Quebec et au Bas-Canada: Les Grands Jurys du District de Montreal (1764-1832),” *Revue d'Histoire de L'Amerique Francaise* 55, no.1 (2001): 85-120. For the grand jury reform movement in nineteenth century Canada, see Nancy Kay Parker, “Reaching a Verdict: The Changing Structure of Decision-Making in the Canadian Criminal Courts, 1867-1905” (Ph.D. dissertation, York University, 1999), 236-90.

⁶⁰³ See Peter Oliver, *'Terror to Evil-Doers': Prisons and Punishment in Nineteenth-Century Ontario* (Toronto: The Osgoode Society for Canadian Legal History and the University of Toronto Press, 1998), 60-62.

⁶⁰⁴ See generally Banks, “The Evolution of Ontario Courts, 1788-1981”; Parker, “Reaching a Verdict.”

⁶⁰⁵ See R. Blake Brown, “The Jury, Politics, and the State in British North America: Reforms to Jury Systems in Nova Scotia and Upper Canada, 1825-1867” (Ph.D. dissertation, Dalhousie University, 2005), and R. Blake Brown, *A Trying Question: The Jury in Nineteenth Century Canada* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2009). See also John Alexander Kains, *How Say You?: A Review of the Movement for Abolishing the Grand Jury System in Canada* (St. Thomas, Ont.: The Journal, 1893) Lederman, *Study of the Civil Jury and Grand Jury in Ontario: Prepared for Ontario Law Reform Commission*; Romney, Mr. Attorney, 298-310.

⁶⁰⁶ See Brown, “The Jury, Politics, and the State in British North America,” 282, also Brown, *A Trying Question*.

by this powerful ideological aura, and have been repealed, or atrophied, once hard-law, new-regime prison inspectorates seemingly occupied the field, as they did, first with the passage of an act of the province of Canada for the inspection of prisons and other institutions in 1859, with a province of Ontario version following in 1868.⁶⁰⁷ However, that transformation did not occur; the old and new instruments of supervision existed in tandem.

The history of the Ontario prison inspectorate has been the subject of considerable historical inquiry, most particularly in the work of Peter Oliver.⁶⁰⁸ The post 1859 survival of the general presentment function of the Upper Canadian grand jury, on the other hand, has remained unexplored. In this chapter I consider the continuation of this old regime aspect of law in the new regime. Using surviving presentments in the records of the Office of the Provincial Secretary, evidence from newspapers, and the records of local governments, in the first part of the chapter I look at the class composition and attitudes of mid-Victorian Ontario grand juries as revealed in the presentments, and discuss the practice of recommendations directed at ‘proper authorities’ at all levels of government, with a view to shedding light on the persistence of this facet of the institution.⁶⁰⁹ In the second part of the chapter, I consider the relative influence of old

⁶⁰⁷ *An Act respecting Inspectors of Public Asylums, Hospitals, the Provincial Penitentiary of Canada and of all common Gaols and other Prisons*, 22 Vic. c.110 (1859); *Act to Provide for the Inspection of Asylums, Hospitals, Common Gaols and Reformatories in the Province*, 32 Vic. c.21 (1868).

⁶⁰⁸ See Oliver, *Terror to Evil-Doers*, Part 3; see also Hodgetts, *Pioneer Public Service* and Hodgetts, *From Arm's Length to Hands-on* for the development of the public service as a whole and Splane, *Social Welfare in Ontario, 1791-1893*.

⁶⁰⁹ ‘Proper’ as used in matters of nineteenth century governance means appropriate. Cities and counties had responsibility for local gaols and other public facilities, the primary subjects of grand jury presentments. Primary sources used in this part of the chapter include the *Toronto Daily Globe*, <http://heritage.theglobeandmail.com.ezproxy.library.yorku.ca/default.asp?sessionID=1951973317>; *The Brockville Recorder*, AO, MS N 144, (1851-4); *The Prescott Telegraph*, N131 R 10, (1861, 1864, 1871); Peterborough County Court of General Sessions of the Peace Grand Jury Presentments, AO RG 22-81 Box 1 [hereafter Peterborough Presentments]; Index registers to general correspondence of the Provincial Secretary, Ontario, AO, RG 8 Series I-1-F 1867-1909, MS 581 reel 1 [hereafter Provincial Secretary’s register, Ontario]; General Correspondence of the Provincial Secretary (Ontario), AO, RG 8 series I -1-D, [hereafter Provincial Secretary’s correspondence, Ontario]; Provincial Secretary (Canada) numbered correspondence file, Library and Archives Canada, RG 5 C1, indices and registers volumes 896 to 930 reel C-10804 to 10809 [hereafter Provincial Secretary’s register, Canada].

regime grand juries and new regime inspectorates on the actions of one low government, namely the Municipal Council of the United Counties of Leeds and Grenville, during the period 1850-1880, as reflected in the counties' municipal records.⁶¹⁰ I speculate whether the grand jury a soft law institution with ad hoc, temporary membership may have had an impact on the 'proper authorities' of Leeds and Grenville equal to or greater than that of contemporaneous hard law inspectorates.

Grand Juries in Canada West/Ontario

In their obituary for Robert Baldwin, the editors of the *Upper Canada Law Journal* waxed eloquently on the "glory of the country," the Municipal Act, for which legislation he was most famous, but insisted that the Jury Act of 1850 was a close rival as his greatest achievement.⁶¹¹ Baldwin's Jury Act is surprisingly succinct (especially when compared to the sixty-plus pages of the Municipal Act), and dealt only with the composition and selection of juries. Nonetheless, as Blake Brown has pointed out, it was both creative and innovative, providing for selection of jurors by ballot rather than by the sheriff, and substituting a sliding scale for the absolute property qualifications employed previously, used in other jurisdictions, and maintained in Canada West for voting and office holding eligibility at every level of government.⁶¹² To provide a sufficient pool of jurors, the act required that the top three quarters of (male) ratepayers by

⁶¹⁰ These include Leeds and Grenville United Counties Court of General Sessions of the Peace Minute Books, AO, RG 22-12-0-9, 1845-1869 MS 699 Reels 2 and 3 [hereafter Leeds and Grenville sessions minutes], and the United Counties of Leeds and Grenville council papers, AO, F-1740-8, 1850-1880, Boxes 12 to 28 [hereafter Leeds and Grenville papers]. The Leeds and Grenville Criminal Assize (Oyer, Terminer and Gaol Delivery) Minute Book (AO, RG 22 2906-0-2) [hereafter Leeds and Grenville assize minutes] was also consulted, though it unfortunately does not cover the entire period, beginning only in 1861, and is frequently illegible.

⁶¹¹ "The Late Robert Baldwin," *The Upper Canada Law Journal* vol.5, Jan. 1859; *An act for the consolidation and amendment of the Laws relative to Jurors, Juries and Inquests in that part of this Province called Upper Canada*, 13 & 14 Vic. 1850, c.55 [hereafter Jury Act, 1850]. The editors gave fewer kudos to the project for which later generations would venerate Baldwin, the realization of the reform movement for responsible government.

⁶¹² See generally Brown, *A Trying Question*, chapter 6.

assessed value in any county would be eligible for jury duty (with some exemptions). Later the pool became even more rarefied by the reduction of the eligible to the top half of ratepayers.⁶¹³ The municipal electoral constituency was designed to be more democratic than this, especially in rural areas. While there were absolute property qualifications for elected officials at every level, (male) voters in townships and villages merely had to be on the assessment rolls, that is, own some amount of rateable property.⁶¹⁴ As a result, jurors were from the outset a (comparatively) elite group within the community.

The jury act created an unwieldy, time-consuming system with copious amounts of paper-work (the cost of which was expected to be borne by the localities), but had the virtue of eliminating much of the potential for corruption for which the system was, justly or not, notorious, and spreading the burden of jury service more evenly throughout the jurisdictions.⁶¹⁵ Although the act set out the proportions of the pool to be allocated to each of the four juries—grand and petit juries for the two levels of courts—and specified who should be exempt from service on each, it was silent as to which ratepayers should serve on what jury, provided they were appropriately discreet, competent, and sound of judgment and character in the opinion of the elected officials who formed the board of selectors.⁶¹⁶

The minute books of the Leeds and Grenville quarter sessions show that in that jurisdiction at least, the grand jurors for superior courts were chosen first, followed by grand jurors for inferior courts, then petit jurors in the same order. It seems likely that other jurisdictions followed this pattern; one speech in the legislative assembly in favour of abolishing the grand jury argued that “the allocation of grand jurors greatly limit[s] the panel of petit

⁶¹³ See Brown, *A Trying Question*, 143

⁶¹⁴ See Municipal Act, 1849, 12 Vic. c.81 s.23, s.53. This rose to \$100 in 1866.

⁶¹⁵ See Brown, *A Trying Question*, chapter 6. See also Romney, *Mr. Attorney*, 294-6.

⁶¹⁶ See Jury Act, 1850, ss. 5 and 6. The selectors were also paid for their trouble.

jurors.”⁶¹⁷ The minutes do not indicate the specific assessed value for the names given, but it seems that ratepayers with property of the greatest assessed value were directed to the grand juries, with the Assize grand jury receiving the most propertied. This impression is supported by the accompanying occupational descriptors. For example, the Leeds and Grenville grand jury list for 1869 for the superior courts includes fourteen ‘esquires’ (a term used to signify justices of the peace, who were eligible for grand, but not petit jury service), eleven ‘yeomen,’ six merchants, and one member of each of the following occupations: blacksmith, cabinet maker, tanner, joiner, tinsmith, manufacturer, hotelkeeper, gas manager, innkeeper and miller. The grand jury list for the inferior courts included twenty farmers, seven merchants, three ‘gentlemen,’ three butchers, two joiners, a baker, a civil engineer, a bank clerk, a waggon [sic] maker, an insurance agent, a hotel keeper, a mechanic, a marble cutter and a tinsmith. The petit jury list for the superior courts was heavier with ‘yeomen’ (thirty-two) and farmers (twenty-nine) though it also included six each of ‘gentlemen’ and merchants, and a variety of business- and tradesmen. The petit jury for the inferior courts consisted mostly of farmers and included fewer merchants and no ‘gentlemen.’⁶¹⁸

Grand juries were likely to include at least a few experienced members. Once having served, jurors were exempt for the next three years, but could then be pressed into service again. Several charges to the grand jury indicate that it was usual to see repeat members. One charge to the Wentworth grand jury acknowledged this, presumably in apology for a lengthy and detailed explanatory address: “[p]erhaps some of you were never on a grand jury before and may not be

⁶¹⁷ *Daily Globe*, 27 January 1876, 4. For a much more detailed breakdown of class and occupation in juries during an earlier period, and a different system of selection in Halifax, see Jim Phillips, “Halifax Juries in the Eighteenth Century,” in *Criminal Justice in the Old World and the New: Essays in Honour of J.M. Beattie* ed. Greg T. Smith et al. (Toronto: University of Toronto Press, 1998).

⁶¹⁸ Leeds and Grenville sessions minutes, 18 December 1868.

again for years to come.”⁶¹⁹ Many grand juries seem to have been aware of the presentments of their predecessors and referred to these explicitly in their own presentments. The court clerk of the general sessions of the county of Peterborough kept a collection of presentments to which subsequent juries may have had access, but this may not have been a general practice; it does not seem to have been done in Leeds and Grenville, where the fact of the presentment was recorded but the content was not, unless it was forwarded to and kept by the relevant ‘proper authorities.’⁶²⁰ However, it can be assumed that grand jurors would at least have had second-hand knowledge of previous presentments through press reports, or because they had been read in aloud in court and had become part of general community knowledge in that way.⁶²¹ Some grand jurors were probably also well-versed in municipal affairs. While municipal councillors and officers were exempt from grand jury duty, this was only during their tenure of elected service. I have not systematically investigated the identities of grand jurors, but one foreman mentioned in the *Daily Globe* in 1875 was “W. H. Howland,” presumably the same of that name to become a notable Toronto mayor.⁶²² In an address to the Simcoe County municipal council, Judge James R. Gowan remarked that “there are many gentlemen in [the council] who have frequently served as grand jurors.”⁶²³

Whatever their level of formal experience, there is little doubt that grand jurors were, as one newspaper noted, “very respectable gentlemen.”⁶²⁴ This respectability—code for the

⁶¹⁹ *Daily Globe*, 1 April 1859, 3.

⁶²⁰ Peterborough is the only jurisdiction for which the Archives of Ontario has a collection of presentments for this period.

⁶²¹ The *Globe*, a daily, had more space for court reporting than did the *Brockville Recorder* or *Prescott Telegraph*, both weeklies which had to fit international, national, provincial, and local affairs, not to mention advertising and notices, in a scant four pages a week.

⁶²² *Daily Globe*, 1 February 1875, 2. Ron Sawatsky, “W.H. Howland,” *Dictionary of Canadian Biography*, http://www.biographi.ca/en/bio/howland_william_holmes_12E.html.

⁶²³ Kains, *How Say You?*, 12.

⁶²⁴ *Daily Globe*, 1 April 1859. For a discussion of the interrelationship of the political and cultural aspects of the mid-Victorian Ontario middle class see Holman, *A Sense of Their Duty*.

propertied middle class—is evident in the attitudes of grand jurors to the varied matters on which they made presentments. Observations on the state of gaols and other institutions of social control and public welfare, such as hospitals, asylums, and Houses of Refuge (where the jurisdiction boasted such facilities), with which I deal in the latter part of this chapter, were the mainstay of presentments during this period. However, the presentments also indicate considerable interest in non-institutional facets of criminal justice, as might be expected, given the grand juries' primary task, the finding of indictments. The plight of young offenders exposed to hardened criminals prompted many expressions of concern, although the suggestion that they be flogged in preference to 'unclassified' imprisonment might not have been considered a kindness by the juveniles in question. Adult male vagrants, on the other hand, attracted juror distaste and gave rise to several proposals for deterrence with hard labour. Still, grand jurors were not shy about advocating for even the *prima facie* 'undeserving,' if they felt these were inappropriately incarcerated, either because, in their opinion, the prisoner had been confined too long for a 'trifling' offence or an inability to produce sureties, and, most frequently, for the mentally ill, especially females, for whom they seem to have had a sincere, if paternalistic, concern.⁶²⁵

The mentally ill had a special significance for the grand juries of the quarter sessions. As noted above, the only 'hard' grand jury power (other than the right to accept or refuse indictments) was the right and duty to determine entitlement and quantum of support for the 'Insane Destitute' of the counties.⁶²⁶ This jurisdiction to infringe on the fiscal autonomy of the counties had its origin in a statutory power to dictate to the court of quarter sessions given to the

⁶²⁵ There may have been a degree of prurience in this interest. See generally Janet Miron, "'Open to the Public': Touring Ontario Asylums in the Nineteenth Century," in *Mental Health and Canadian Society: Historical Perspectives*, ed. David Wright and James E. Moran (Montreal: McGill-Queen's University Press, 2006), 19-48.

⁶²⁶ The grand juries of the superior courts had no jurisdiction to order support for the mentally ill.

grand jury of the Home District in 1830. This was extended to quarter sessions juries in all districts in 1832, and was then held to apply to the quarter sessions juries of the counties, an extension made explicit by legislation in 1858.⁶²⁷ About half of the presentments of the sessions' grand juries that were recorded by the clerk of the peace of the United Counties of Leeds and Grenville dealt exclusively with 'lunatics.' Often overlooked by historians, the law regarding the destitute insane was an early exception to the well-known lack of mandatory poor relief in Upper Canada.⁶²⁸ A finding by the grand jury that a person was both destitute and insane resulted in a peremptory order by the chairman of sessions to the treasurer of the county council to provide for the resident 'lunatic' by means of payments to a third party for his or her benefit.⁶²⁹

In the so-called final presentments, the issues canvassed by grand juries at both levels went beyond the specific problems of insanity and criminality to issues of more general interest.

⁶²⁷ See *An Act respecting the support of destitute insane persons*, 11 Geo IV c. 20 (1830); 3 Will. IV c. 45 (1832), 22 Vic. c.122 (1858). Whether these powers really qualify as hard law is arguable. In theory these decisions would have been reviewable by certiorari or mandamus, but there is no record of any such proceeding in the reported cases. See infra regarding the doubts of the county judge regarding the legal appropriateness of a grand jury finding concerning a 'lunatic' to the Leeds and Grenville Counties' Council. In "A Janus-Like Asylum: The City and the Institutional Confinement of the Mentally Ill in Victorian Ontario," (2008) *Urban History Review/ Revue d'Histoire Urbaine* 36 no.2: 43-52, authors David Wright, Shawn Day, Jessica Smith and Nathan Flis express their surprise at the high numbers of rural patients who were treated at the Toronto asylum. See also Joseph Dunlop, "Politics, Patronage and Scandal at the Provincial Lunatic Asylum, 1848-1857," (2006) *Ontario History*, 98 (2), 183-208.

⁶²⁸ Charlotte Neff, "Pauper Apprenticeship in Early Nineteenth Century Ontario," *Journal of Family History* 21, no. 2 (1996): 144-71; Russell Charles Smandych, *Upper Canadian Considerations about Rejecting the English Poor Law, 1817-1837: A Comparative Study of the Reception of Law* (Winnipeg: University of Manitoba, Faculty of Law, Working Paper Series vol.9, Canadian Legal History Project, 1991); Russell C. Smandych, "William Osgoode, John Graves Simcoe and the Exclusion of the English Poor Law from Upper Canada," in *Law, Society and the State: Law and Legal Pluralism in the Making of Modern Societies*, ed. Louis A. Knafla and Susan W. S. Binnie (Toronto: University of Toronto Press, 1995), 99-128; J. C. Levy, "The Poor Laws in Early Upper Canada," in *Law and Society in Canada in Historical Perspective*, ed. D. J. Bercuson and L. A. Knafla (Calgary: University of Calgary Studies in History No. 2, 1979), 23-44. David Murray made note of the legislation in passing: Murray, *Colonial Justice*, 119.

⁶²⁹ The genesis of this act is beyond the scope of this study, but the rationale may have been that the mentally ill were seen as more of a challenge to their families and neighbours who might be expected to assist. Paupers could usually help out in some way; the mentally ill could only be a burden by definition, and their presence in a family could be devastating to those that were otherwise barely subsisting, especially where the afflicted person had been a supporting member. See Thierry Nootens, "'For years we have never had a happy home': Madness and Families in Nineteenth-Century Montreal," in *Mental Health and Canadian Society: Historical Perspectives*, ed. James E. Moran and David Wright (Montreal: McGill-Queen's University Press, 2006), 49-68 Wright and Moran point out in their introduction that "just as not all institutionalized were mad, not all mad were institutionalized." (9).

These included such disparate—and multi-jurisdictional—matters as extradition treaties, snow removal, gun control, furious driving, free public education, the bravery of the volunteer militia defenders against the Fenian threat (for whose dependents a Leeds and Grenville grand jury urged support from public funds), and the reprehensible conduct of young people. One popular topic was court facilities for participants, including spectators and witnesses as well as jurors. On this issue one can see the consequences of a rising standard of living and concomitant expectations; the provision of cushions for juries and waiting rooms for witnesses interested juries in the 1870s, but not in the 1850s, although the facilities can hardly have been more comfortable or commodious in the earlier decade.

Grand jury service was evidently not a particularly attractive duty, especially for those who did not live in or near the county seat.⁶³⁰ One presentment of the Leeds and Grenville grand jury made suggestions concerning the time for calling them to jury service, noting that travel time made morning sittings a hardship for many.⁶³¹ A Perth grand jury went still further, stating that as reforms of the criminal law resulted in the grand jury being called a considerable distance for a “mere form,” the institution should be done away with at sessions.⁶³² A partial boycott of jury duty by Leeds and Grenville quarter sessions grand jurors occurred in January 1854, when only eight of the summonsed individuals appeared, forcing the sheriff to make up the numbers on the spot and moving the chairman to order fines for the absentees, which seems to have deterred further recalcitrance. Still, the Upper Canadian resistance to travelling for jury service seems to have been much less than Blake Brown finds was the case in Nova Scotia at the same time, perhaps due to better infrastructure in Upper Canada, and/or the greater accountability afforded

⁶³⁰ See Brown, *A Trying Question*. See also R. Blake Brown, “Research Note: Storms, Roads and Harvest Time: Criticisms of Jury Service in Pre-Confederation Nova Scotia,” *Acadiensis* 36, no. 1 (2007): 93-111.

⁶³¹ Leeds and Grenville council papers, 1876 (3d).

⁶³² Correspondence of Provincial Secretary (Ontario), 1878, #1553.

by more democratic local government. In any event, having made the trip out of either legal or moral obligation, grand jurors made the most of the opportunity they did not seek. Few grand juries seem to have left their assignment without having made some recommendations.

Strangely, given the grand jurors' stated dislike of having to travel to the courts, the condition of roads and highways does not appear as a subject of concern in any of the presentments canvassed. The state of the roads had been a traditional concern of grand juries in England and Nova Scotia as well as in Upper Canada, and as I have shown, remained a preoccupation for the county councils, especially in the earlier part of the period.⁶³³ Perhaps the fact that failure to keep local roads in repair, as well as giving rise to nuisance claims against the municipalities, was a statutory misdemeanour and thus potentially the subject of an indictment, excluded this as a fit subject for presentment. More likely, grand jurors were well aware of the fact that the new municipal councils were already devoting a considerable part of their time and resources to transportation infrastructure and declined to press a matter that was already clearly an accepted priority.⁶³⁴

The "crying evil" of intemperance also made fewer appearances in the general presentments than might have been expected.⁶³⁵ Possibly that absence was due to intra-jury conflict on this issue, as is indicated in one presentment from the county of Peterborough, wherein the foreman indicated that the grand jury forbore from presenting on the issue "owing to the various and confused opinions which have arisen" on the point.⁶³⁶

⁶³³ See Chapter 5. Compare Eastwood, *Governing Rural England*, 33; Brown, "Research Note: Storms, Roads and Harvest Time."

⁶³⁴ On 21 October 1870 W. H. Boulton applied to a grand jury in Toronto to indict the city for misdemeanour in leaving certain streets in a bad condition: *Daily Globe*, 21 Oct. 1870, 2.

⁶³⁵ See generally Craig Heron, *Booze: A Distilled History* (Toronto: Between the Lines Press, 2003); Brian Paul Trainor, "Towards a Genealogy of Temperance: Identity, Belief and Drink in Victorian Ontario" (M.A. thesis, Queen's University, Kingston, Ont., 1993). The phrase 'crying evil' is from Peterborough presentments, 5 June 1878.

⁶³⁶ Peterborough presentments, 5 June 1878.

Although majority agreement rather than unanimity on these issues was the technical requirement, consensus seems to have been *de rigueur* for grand as for petit juries.⁶³⁷ Minority reports seem to have been rare or non-existent. That was also true of nonfeasance of the duty to make a presentment; although the Leeds and Grenville sessions minutes do not always record that a presentment was made, it seems likely that in those cases either the clerk neglected to record it, or the judge or chairman decided it to be unnecessary, as grand jurors could not leave their post until formally discharged, and the presentments were customarily the last thing the grand jury undertook before being excused.⁶³⁸ Any conflict between judge and jurors on this issue would likely have attracted a notation to that effect.

It might be wondered why, if the Peterborough grand jury “concluded not to dictate on the question” of drink, the foreman chose to mention it at all. The answer seems to be that a preliminary agenda for presentment deliberations was set by the presiding judge. The charge to the jury was a standard element of criminal court proceedings, and it was assumed that the judge or magistrate need not confine himself to the cases on the docket. According to the 1816 edition of Joseph Chitty’s *Treatise on the Criminal Law*,

the chairman of the sessions usually delivers his charge to [the grand jury], relative to the bills about to be submitted to their consideration, the state of the county, and the duties he has to fulfil.....[T]he judicious magistrate will take care not only that his remarks are, in general, suited to the offices which a grand jury have to discharge, but have a plain reference to local objects, events, discussions, and concerns as far as they properly fall within the limits of his jurisdiction, and seem entitled to his notice. He will strive to allay animosities, to destroy the spirit of party, to discountenance every receptacle of idleness and vice as well as every vestige of popular barbarity and grossness.⁶³⁹

⁶³⁷ Petit juries were made up of twelve jurors. Grand jurors were to number at least twelve and fewer than twenty-four, and a vote of twelve was considered binding: for the rules and procedures for nineteenth century grand juries in Ontario see Kains, *How Say You?* The Leeds and Grenville sessions grand jurors tended to number at least seventeen.

⁶³⁸ With the exception of presentments concerning the destitute insane, which in Leeds and Grenville were usually—though not always—the first item on the grand jury’s agenda.

⁶³⁹ Joseph Chitty, *A Practical Treatise on the Criminal Law*, vol.1 (London: A.J. Valpy, 1816), 211.

“Animosities... [and] the spirit of party” seem not to have much interested mid-Victorian judges and magistrates in Canada West/Ontario, but many other political issues did attract their attention. Writing on the predilection of superior court judges, especially the reform-minded, to use the opportunity of addressing the grand jury as a sort of bully pulpit for the expression of views for which any other outlet might be considered inappropriate at best and unconstitutional at worst, Patrick Brode has noted that judges “were not shy about rendering their opinions,” especially regarding the condition of prisons.⁶⁴⁰ Nor were they reticent in eliciting opinions from the grand juries to supplement their own. The presentments are full of evidence of judicial direction as to what to do (for example, to visit the hospital “in accordance with your Lordship’s wish,”) to consider (“our attention drawn by your Lordship,”) and, more insidiously, to think (“your Lordship’s suggestive charge”).⁶⁴¹

Simcoe County Judge James Gowan seems to have been defensive about an actual or feared allegation that he had overly influenced grand juries. Ironically, given that he was a strong advocate of grand jury abolition, Gowan protested that he was “only anxious to avail myself of these occasions to reach the thinking public.”⁶⁴² He and his colleagues were likely well aware that if the newspapers did not report their charges they might still report the presentments that followed.⁶⁴³ The press found presentments to be good copy and printed a variety from jurisdictions across the colony, the country, and even the continent. Despite their non-binding status, grand jury presentments may have had a greater perceived legitimacy than a judge’s charge, especially on issues that were not directly law-related.

⁶⁴⁰ Patrick Brode, “Grand Jury Addresses of the Early Canadian Judges in an Age of Reform,” *The Law Society of Upper Canada Gazette* 23 (June 1989): 130-47, 139.

⁶⁴¹ *Daily Globe*, 18 November, 1865; Leeds and Grenville council papers, 1866 (5); Provincial Secretary’s register (Ontario), 1867, #91.

⁶⁴² Charge to the Grand Jury of Simcoe County, 1881, quoted in Kains, *How Say You?*, 13.

⁶⁴³ See Brown, *A Trying Question*, 189.

Still, a grand jury was a transient, ephemeral group with no institutional identity once released from service, and no recognized right to initiate direct communication with governments. The Leeds and Grenville assize and quarter sessions minute books indicate that it was in the judge's discretion whether a presentment was forwarded to the provincial secretary or county council or both or merely 'filed.' Cover letters by the clerks who copied the presentments attest to the fact that the presentments were being sent pursuant to the judge's direction. Often the judge took a personal interest; Peter Oliver noted that after mid-century the judges of common pleas, and Justice James Buchanan Macaulay in particular, maintained an ongoing reform campaign with a series of letters accompanying presentments on gaols.⁶⁴⁴ In a letter to Toronto City Council, Justice Adam Wilson highlighted the points of the presentment he wished to draw to the councillors' attention, as did Justice Richards on several occasions to the Leeds and Grenville council.⁶⁴⁵ One entry in the Leeds and Grenville assize minute books relates that the judge took the presentment with him back to Toronto, presumably to hand deliver.⁶⁴⁶ While grand juries could and sometimes did ask that the presentment be forwarded to one or other of the 'proper authorities,' once they were *functus officio* they had no means of ensuring or even knowing whether this had been done. In the United States, grand juries may have been more disposed to communicate with the government on their own, but in Canada West/Ontario the presentment process was a joint effort.⁶⁴⁷

⁶⁴⁴ See Oliver, *Terror to Evil-doers*, 330.

⁶⁴⁵ *Daily Globe*, 21 November 1865. It is possible that Justice Richards took a particular interest in Leeds and Grenville since he had once been the local member of the legislative assembly: Ian MacPherson "Richards, William Buell," *Dictionary of Canadian Biography*, http://www.biographi.ca/en/bio/richards_william_buell_11E.html.

⁶⁴⁶ Leeds and Grenville assize minutes, 26 Sept 1871.

⁶⁴⁷ On 10 December 1875, the *Globe* reported that a Missouri Grand Jury had sent a letter to President Ulysses S. Grant in words that suggested the lack of a judicial intermediary (1).

Patrick Brode has suggested a certain condescension by the judges “as they looked down on the yeoman of the county.”⁶⁴⁸ There is no question that the grand jurors tended to be deferential, often to the point of obsequiousness, as they congratulated the judges on their elevation to the bench, wisdom, and/or health. However, grand jurors also displayed signs of independence and a pronounced sense of their own importance. Occasionally grand juries chose not to follow the script set out for them by the judges. The refusal of the Peterborough grand jury to “dictate” on temperance was mentioned earlier. One jury remarked that because they heartily concurred with the judge there was no need for a written presentment.⁶⁴⁹ Several Toronto grand juries observed in their presentments that they declined to visit certain institutions as judicially directed because these places had just been inspected or because they did not think it necessary.⁶⁵⁰

There are also hints that some grand jurors saw their duty as arising from “time honoured tradition” or “accustomed usage” rather than mere judicial fiat. On occasion, a grand jury might itself seem somewhat patronizing, as when one “express[ed] sympathy with [the judge’s] humane tone.”⁶⁵¹ The *Globe* reports also reveal apparent judicial respect for grand jurors, both in the charge and in the reply. Often judges were quoted thanking jurors in fulsome terms and assuring them that the presentments would be forwarded to the proper authorities who would “no doubt” give them due consideration. While some charges tended to heavy-handedness in assigning inspectoral duties to the grand jurors, others show more ambivalence; one such charge

⁶⁴⁸ Brode, “Grand Jury Addresses of the Early Canadian Judges in an Age of Reform,” 139.

⁶⁴⁹ *Daily Globe*, 3 February 1876.

⁶⁵⁰ It should be noted that institutions in Toronto could be visited by grand juries of the Recorders’ courts and assizes of the city, and of the quarter sessions and assizes of the County of York several times a year.

⁶⁵¹ *Daily Globe*, 31 January 1857, 2.

declared a duty to visit the gaol and asylum, and thereafter such municipal or provincial institutions as the grand jury themselves might choose.⁶⁵²

Grand Juries and Proper Authorities

Grand jurors' consciousness of their own worth is also revealed by their frequent expressions of frustration and resentment at the fact that previous recommendations had not been followed.

While many grand jurors may have felt that their efforts were in vain, the records of the Provincial Secretaries before and after confederation show that presentments were not completely ignored at the higher government level. When received, the secretary or his clerk furnished the presentment with a standard printed wrapper, on which he filled in information about the source, and acknowledged receipt in a letter to the court clerk. Then he would forward the presentment to the appropriate government department or departments. Presentments tended to be undifferentiated, and 'the proper authorities' to whom they might be relevant could be multiple, especially after confederation. The first person to review a presentment after the provincial secretary or his clerk was usually the Attorney General, who would acknowledge it, often with a recommendation or comments, and return it to the provincial secretary's office. Others who might see the same copy of the presentment included the premier, the prison inspector, and the director of the asylum. Each would minute the wrapper with his initials and the date of review. Turn-around time was usually no more than a few days. In the case of 'lunatics' whom the grand jury felt were wrongly incarcerated, if the asylum agreed to accept them the provincial secretary would be deputed to inform the clerk and advise the sheriff to make the necessary arrangements.

⁶⁵² *Daily Globe*, 15 December 1874, 4.

Whether the more amorphous items such as presentments on the death of the Prince Consort or free public education made much impact on the executive is hard to say, but like the petitions that were regularly sent on such matters, it is possible that they were used as an opinion poll might be today, to gauge the mood of the electorate.⁶⁵³ How much value the recipients would attribute to the opinions would doubtless depend on how representative of the electorate the presentments were considered to be. Even allowing for the exclusion of voters who were not among the top half of the assessment roll, it is not at all clear that the presentments were necessarily even geographically comprehensive, as the government would have been aware.

At the beginning of the period under review, it appears that only a handful of presentments were ordered to be sent to the provincial government. This began to increase in the latter half of the 1850s. In 1880 some twenty-five presentments were recorded by the provincial secretary.⁶⁵⁴ Yet that is still probably only a fraction of all the presentments generated by grand juries during the year, as these juries met three (later two) times a year in each jurisdiction at sessions and at assizes. Some counties were more frequently represented in the registers, while some rarely appear; that variation can be attributed to the idiosyncrasies of the judge and jury and perhaps the relative condition of county gaols as the *sine qua non* of the general presentment agenda.

Though the excerpt from Joseph Chitty quoted earlier refers to charges by magistrates, and while county judges of Canada West/Ontario, sitting as chairmen of quarter sessions, often did as he stipulated, the practice of using the charge for purposes not strictly connected to the

⁶⁵³ See generally Chapter 8, also Jeffrey L. McNairn, *The Capacity to Judge: Public Opinion and Deliberative Democracy in Upper Canada, 1791-1854* (Toronto: University of Toronto Press, 2000).

⁶⁵⁴ The zenith was 1878, when twenty-seven presentments were recorded in the register.

trial of offences seems to have been more popular with judges at the assize level.⁶⁵⁵ About three-quarters of the presentments sent to the provincial government were from superior courts, a pattern that seems to hold true of publication in the press as well. The preponderance of charges and presentments from the assizes reported in the *Globe* could be attributed to elitism on the part of the editors and their readers, or on the part of the judges and grand juries themselves. In Leeds and Grenville, court minute books indicate that the sessions grand juries generated between twenty-one and twenty-four presentments over thirty years (excluding those dealing solely with the destitute insane), whereas the assize minutes show sixteen over nineteen years, a comparable ratio. However, the respective minutes of the sessions and assizes show that more of the presentments from the latter were noted as having been sent to the council or government, and more of the assize presentments made their way to the counties papers currently in the Ontario archives.⁶⁵⁶ Quarter sessions charges and presentments may have tended more to the perfunctory; the clerk of this court in Leeds and Grenville often records that the chairman made “his usual remarks” to the grand jury and that they made theirs in return.

It may have been the case that the judges of quarter sessions were less convinced of their own mission in this respect, or that there was too much social, professional, and geographical distance between the county bench and the government and, paradoxically, too little distance from the other ‘proper authorities,’ the county councils. The provincial government paid the county judge’s salary, but the Leeds and Grenville Council papers show a close relationship between the two branches of low law and governance. Indeed, the clerk of the peace and the

⁶⁵⁵ The county judge was *ex officio* chairman of quarter sessions. The Leeds and Grenville council minutes refer to him as chairman and esquire, until a reform which allowed him to sit alone, that is, without at least one justice of the peace, after which time he is referred to as the Honourable Judge of the County Court.

⁶⁵⁶ Three of the presentments mentioned in the session’s minutes are not identifiable as being about the destitute insane or not. Of course, it is possible that the clerk of the peace did not record all the presentments. That is also true of the assize, as the Leeds and Grenville council papers show presentments from the assizes for which there is no notation in the assize court minute book.

clerk of the counties were the same person until 1857. The counties' council was in effect the landlord for the courts and their personnel, and once sent a message to the county judge that the Division court would have to be held in the grand jury room because the council would be using the court room for municipal business.⁶⁵⁷ Property committee reports include numerous instances of requests by the judge and other court officials for space, matting, furniture, stoves, and even curtains.⁶⁵⁸ Hence it is possible that the county court judge was less than assertive with the council, or that familiarity bred, if not contempt, at least lack of deference by the latter. On one occasion, the apparently legally dubious generosity of a Leeds and Grenville grand jury finding regarding the eligibility for support of a woman as destitute and insane was raised after the fact (and presumably without notice to the jurors) by the chairman of the sessions in a letter to the county council, to no avail—it does not appear that the letter was even referred to a committee.⁶⁵⁹

Or it may be that on this issue the council simply considered the grand jury to be the legitimate decision maker. Though the Leeds and Grenville quarter sessions' records are scanty, and it is impossible to tell what proportion of, or to what extent, applications were successful, it does not appear that claims for support for the destitute insane were ever challenged in court by a representative of council. Nor is there any indication of *viva voce* evidence from an alleged lunatic or his or her sponsors. Probably the grand jury found on the basis of a petition with

⁶⁵⁷ Leeds and Grenville council papers, 1856 (3).

⁶⁵⁸ A letter to the Warden from William Chewett and Sons, publishers, claimed that several councils subscribed to court reports for their county judges. (Leeds and Grenville do not appear to have followed suit.) Leeds and Grenville council papers, 1865 (5).

⁶⁵⁹ Letter of James Jessup, clerk of the peace, to the Warden of the County Council of Leeds and Grenville: "Sir, I am directed by the Chairman of the Quarter sessions to call the attention of the Council to a Presentment made by the Grand Jury J in the month of March last granting the sum of thirty dollars for the support of Mary Ann Goff, ... The Grand Jury in authorized by the consolidated statute of Upper Canada chapter 122 to make presentments for the support of Insane Destitute persons but his Worship is not satisfied that Mrs. Goff is a person coming within the meaning of the statute, and submits the matter to the Council for their directions as to whether or not the amount shall be paid." Leeds and Grenville council papers, 1868 (5), 16 June 1868.

supporting signatures or affidavits, similar to those presented to township councils for ordinary (discretionary) poor relief, or to the county council for relief for (similarly discretionary) relief for other disabilities, such as blindness, deafness, or ‘idiocy.’⁶⁶⁰ Perhaps there was no perceived need to challenge the amounts claimed for the maintenance of the insane, as these appear to have been commensurate with the discretionary amounts granted by the councils of these townships for poor relief.⁶⁶¹

While the county judge might not have been able to trump the grand jury in such a case, on other issues he may have been more influential, an influence that may have been more social than legal and exercised informally. One letter to the chair of the Leeds and Grenville property committee in 1878 from the county judge requested a personal meeting on the matter of procuring a table for the judge’s chambers.⁶⁶² That county judges were considered to be appropriate authorities on the matter of gaols is attested to by a letter by Leeds and Grenville Warden William Garvey to E.A. Meredith, the Prison Inspector. Angry at what he saw as the Inspector’s meddling in county business, Garvey argued that gaol matters could safely be left to the superintendence of the county judge, the sheriff and the warden.⁶⁶³ Whether Garvey understood that judges would be assisted by grand juries in his preferred state of affairs is

⁶⁶⁰ See Chapter 5. Though careful not to trench on the jurisdiction of the townships (and presumably not wanting to be accused of playing favourites among its constituent units), the Leeds and Grenville council regularly granted money to worthy causes such as hospitals for the deaf and dumb, and provided matching funds where a township wished to send a disabled resident out of the jurisdiction to a residential facility.

⁶⁶¹ On 11 March 1863, the Grand Jury of Leeds and Grenville “presented to the Court... [that] Sally Hubble of Augusta in the County of Grenville be allowed the sum of fifty cents per week for each of her two lunatic sons for the present year.” In 1872, the *Prescott Telegraph* reported that Mrs. Hubble had been granted \$25.00 for the year on her own account out of the ‘poor funds’ of the Township of Augusta. Leeds and Grenville sessions minutes, March 11, 1863; The *Prescott Telegraph*, 3 August 1871, 3. What mid-Victorian Ontario lacked in privacy, it seems to have made up for in civic transparency.

⁶⁶² Letter of Judge H.S. Macdonald to Mr. Stafford, Leeds and Grenville council papers, 1878 (3a). Most requests seem to have been made in writing. (The judge was granted the table.)

⁶⁶³ Letter of William Garvey to E.A. Meredith, Leeds and Grenville council papers, 1862 (5).

unclear, but there is no other evidence in the Leeds and Grenville papers of a county judge exercising influence over gaols other than indirectly by forwarding the grand jury report.

Despite Garvey's assertion that the gaols were well supervised, the inspectorial assault on local autonomy continued apace. After the issue of gaol conditions had been raised for many years by grand juries, judges and rudimentary government inspection, the province took steps to provide administrative infrastructure—a new form of 'hard' law for the province, in the form of prison inspectorates. The first of these was introduced in 1859, the second reconfigured for the new province of Ontario in 1868.⁶⁶⁴ Peter Oliver has written extensively of the extreme frustration of the few itinerant inspectors—five led by E. A. Meredith pre-confederation, and J.W. Langmuir, the sole post-confederation Ontario inspector—with what they saw as the obstruction of their mandate by county councils.⁶⁶⁵ Although Oliver did show some sympathy with the budgetary concerns of the justices of quarter sessions when gaols were their bug-bear prior to local government reform, he accepted that the municipally administered county gaols post reform were badly in need of amelioration and that councils were bent on resistance. Perhaps because he relied on the Inspectors' own professionally biased reports and the presentments filed with the government, which were skewed to the critical by the very fact that they were forwarded, Oliver inferred that the grand juries, which he credited "in the absence of appointed inspectors [as having] served to prevent some of the worst abuses" in the early years, were rendered irrelevant by the advent of correct and crusading bureaucrats.⁶⁶⁶ The Leeds and

⁶⁶⁴ *An Act respecting Inspectors of Public Asylums, Hospitals, the Provincial Penitentiary of Canada and of all Common Gaols and other Prisons*, Canada, *Statutes*, c.110 (1859); *An Act to Provide for the Inspection of Asylums, Hospitals, Common Gaols and Reformatories in the Province*, Ontario *Statutes*, c. 21 (1868); Oliver, 'Terror to Evil-Doers', chapters 9 and 10.

⁶⁶⁵ Peter Oliver, "Meredith, Edmund Allen" *Dictionary of Canadian Biography*, http://www.biographi.ca/en/bio/meredith_edmund_allen_12E.html; Peter Oliver, "Langmuir, John Woodburn" *Dictionary of Canadian Biography*, http://www.biographi.ca/en/bio/langmuir_john_woodburn_14E.html.

⁶⁶⁶ Oliver, 'Terror to Evil-Doers', 60.

Grenville council papers provide ample evidence for these arguments, but also show that the situation was more complicated than Oliver describes.

There is nothing in the presentments to suggest that there was any crisis in the condition of the Leeds and Grenville counties facilities as the 1850s began. The first presentment from that decade to be filed with the Council papers, in 1852, includes a complaint—which later presentments would repeat—that the court and public are disturbed by excessive noise during proceedings, and “suggests...having the court Room and passages [sic] connected there with covered with strong matting or Carpeting which would greatly lessen if not wholly [sic] prevent the annoyances....”⁶⁶⁷ The gaol, however, was “clean and secure,” with no complaints from the prisoners, who are said to be “satisfied and grateful [sic] for the humane attention of the Jailor.”⁶⁶⁸ That wording is similar to many presentments in Leeds and Grenville and other jurisdictions of the time that seemed to follow a similar format in regards to the gaol report, focussing especially on the performance of the gaoler. The gaoler was generally commended, but the approval was not supposed to be formulaic. Chief Justice Draper, in a charge reported in the *Brockville Recorder*, reminded one grand jury of the importance of this part of their duty, citing an incident in England “where two or three youth committed suicide to escape the torture of the keeper of the prison and his myrmidons.”⁶⁶⁹

Doubtless it is unsafe to draw too much from the alleged satisfaction of the prisoners with their treatment. Oliver cited instances in which prisoners were vehement about terrible conditions in the colonial period, so they were presumably not without voice, but they were naturally in a somewhat vulnerable position when it came to the gaoler. The grand jurors’

⁶⁶⁷ Leeds and Grenville council papers, 1852 (8) (no date).

⁶⁶⁸ Ibid. The courtroom was carpeted. Later presentments and judges’ letters requested (and received) carpeting in the halls and galleries, on account of noise and distraction.

⁶⁶⁹ *Brockville Recorder*, 27 October 1853, 2.

tendency to approbation of gaolers may also have been partially due to a structural bias, albeit a less direct one. Grand jurors exhibited a similar appreciation of officials on whose assistance they relied in the performance of their duties, including the directors of the other institutions visited, the county crown attorney, and the judge himself. Yet just as in the case of the judges, it is clear that this was often a two-way street; the officials in question also sought to make use of the grand jury to add authority to their own concerns and complaints.⁶⁷⁰ Nor is there any reason to suspect that the gaol staff was less than exemplary, as even the Prison Inspectors, although they tended to be sparing in their praise, had only one negative comment concerning the Leeds and Grenville gaol employees, and that for a turnkey who was dismissed for negligence following an escape, rather than for ill-treatment of prisoners.⁶⁷¹ Indeed, during this entire period the prison inspectors had no qualms about the cleanliness or upkeep of the prison, and it is clear from the property committee records that the council had the gaol painted and repaired on an ongoing basis. Neglect and negligence were not problems, it would seem. Rather, the core of the conflict between the council and the inspectorate seems to have derived from differing missions and administrative structures and from a related divergence in expectations and assumptions.

It is instructive that the first criticism of the gaol during the period under review came neither from the grand jury nor the inspectorate, but from the gaol surgeon, and that his complaints were related to his own professional priorities. In October of 1856, Dr. Thomas Reynolds wrote to the assize judge, emphasizing that “though it was not strictly his duty” to report, he had concerns that the gaol walls were insufficient, resulting in a restriction on outside

⁶⁷⁰ James Moran has written that in 1844 a conflict between the Asylum superintendent and the Board of Commissioners was initiated by the publication of a grand jury report that took the position espoused by the superintendent who had guided the grand jury in their inspection: James E. Moran, *Committed to the State Asylum: Insanity and Society in Nineteenth Century Quebec and Ontario* (Montréal: McGill-Queen's University Press, 2000), 53.

⁶⁷¹ Duplicate of letter of Inspector of Prisons and Asylums, 1 June 1872, Leeds and Grenville council papers, 1872 (4).

exercise, and that there were no facilities for sick inmates.⁶⁷² The next month he repeated his concerns in a letter to the court of quarter sessions, adding a request for further remuneration for himself.⁶⁷³ In response, the assize grand jury agreed on the question of security, but was silent as to the erection of a small building to serve as a hospital, whereas the quarter sessions' jury agreed with all the suggestions, and recommended the salary increase.⁶⁷⁴ Success was similarly mixed when both presentments with the accompanying letters were forwarded to the council, which in turn referred them to the newly established standing committee on counties property.⁶⁷⁵ The committee recommended repairs to the wall, and the increase in salary, but balked at the hospital "in the present state of finances."⁶⁷⁶ A letter from the sheriff sounding alarms as to a water supply problem, a broken stone floor and consequent rat problem, and severe leaks in the roof was referred to a special committee to make the necessary repairs.⁶⁷⁷ The rats were never mentioned again, so presumably they were either exaggerated or eradicated, the roof received a temporary repair, and the sheriff was authorized to have the prisoners dig a new well and to call on the Treasurer for payment for water deliveries in the meantime.⁶⁷⁸

In 1858 a grand jury of the quarter sessions, reconsidering Dr. Reynolds' request, advised once again in favour of improvements to the walls, but decided "it was prudent to forbear" on the question of the hospital.⁶⁷⁹ It is difficult to tell whether the implied reason for the

⁶⁷² Letter of Dr. Thomas Reynolds to Justice Hagarty, 20 October 1856, Leeds and Grenville council papers, 1856 (1).

⁶⁷³ Letter of Dr. Thomas Reynolds to Chairman George Malloch, 18 November 1856, Leeds and Grenville council papers, 1856 (1). At this time the court was responsible for appointing and paying the gaol surgeon, a part-time contract position. Later the council took over these responsibilities.

⁶⁷⁴ Presentment to Assize, 24 October 1856, Leeds and Grenville council papers, 1856 (6); Presentment to Quarter Sessions, 18 November 1856, Leeds and Grenville council papers, 1856 (6).

⁶⁷⁵ In the early 1850s gaol matters were referred to the omnibus Finance and Assessment committee.

⁶⁷⁶ First report of the standing committee on property, 28 May 1857, Leeds and Grenville council papers, 1857 (3).

⁶⁷⁷ Letter of Adiel Sherwood, 7 April 1857, Leeds and Grenville council papers, 1857 (2).

⁶⁷⁸ First report of standing committee on property, 14 October 1857, Leeds and Grenville council papers, 1857 (2).

⁶⁷⁹ Presentment of 20 April 1858, Leeds and Grenville Council papers 1856 (6). (Some of the presentments have been filed together in an earlier year, suggesting that someone culled them from several years and subsequently filed them all according to the earliest date.)

decision not to proceed with the gaol hospital for lack of funds was disingenuous. The late 1850s were a time of province-wide depression.⁶⁸⁰ Municipal councils were elected annually, and budgets and rates set only for that year. There is no reason to think that the counties were not as hard-up for funds, especially as to capital, as they alleged, or that the grand juries were not aware of this.

That the council was not expecting an extreme condemnation of their gaol by the provincial bureaucracy is revealed by the Warden's 1857 address to council in which he announced the proclamation of the new prisons inspection act, commenting that he expected the council "cheerfully [to] cooperate with the Government in placing the Gaol of these counties upon such a footing as will make it such an institution as the Legislature contemplated."⁶⁸¹ The next year he recommended that Dr. Reynolds be appointed to the inspectorate.⁶⁸² Change was clearly in the offing, though, and council set up a special committee to meet with the Inspectors as required by the statute. The inspectors, however, were dilatory about meeting, which ironically may have resulted in deterioration of the gaol in the meantime. Perhaps under the influence of interest from the press and the concern of a reformist judge, the gaoler and two grand juries found the gaol to be in need of repair and renovation. One of these reports was particularly pointed, recommending:

- 1st That the different cells for the Prisoners need to be enlarged and further ventilated
- 2nd That the Building should be enlarged in order to accomplish the object above referred to as well as those alluded to hereafter
- 3rd That great necessity exists for separate apartments for Male & for Female Juvenile offenders to avoid the serious evil of contamination by those more hardened in crime

⁶⁸⁰ See McCalla, *Planting the Province*, Chapter 12, Michael Piva, "Government Finance and the Development of the Canadian State," 264.

⁶⁸¹ Warden's address, 12 October 1857, Leeds and Grenville council papers, 1857 (2).

⁶⁸² Leeds and Grenville council papers, 1858 (2).

4th That all the cells of the Jail should be prepared with a view to the comfort and cheerfulness of the Prisoners so far as may be consistent with perfect safety
5th That separate apartments for the sick should be prepared say for the Males & for Females
6th That Baths for the general cleansing & health of the prisoners are desirable
7th That either a good well or cistern should be provided to ensure a sufficient [sic] of good water
8th That the Walls enclosing the Yards of the Jail are insufficient as a watch is found necessary to prevent escape.⁶⁸³

The council's property committee, while urging renewed temporary protection for the roof, declined to recommend the "significant outlay" implicitly requisite in the presentments. Though they did vote money for a gaol library at the behest of the gaol surgeon and sheriff, and expressly concurred with the criticisms set out in the presentments, committee members cited their fear that whatever improvements were undertaken might not be in accord with the Inspector's requirements. While that determination may well have been an insincere procrastination, given later developments it also showed a degree of perspicacity.

Once the Inspectors finally did arrange to meet, they sent a four-page illustrated pamphlet in advance, setting out plans for a model gaol. The ideal building would be of specific proportions, close to the court, with at least an acre of yard space, waxed hardwood floors and wide corridors.⁶⁸⁴ To comply with this plan would require an even more significant capital expenditure than the grand juries' suggested improvements. Unlike the grand juries, the inspectors made no acknowledgement that there was an operating gaol in existence that had already been erected with local taxes. As might be expected, the council and committee took

⁶⁸³ Presentment dated November, 1858, Leeds and Grenville council papers, 1856 (6). As noted, the dates of the council papers files do not always match the dates of the folders. The grand jury also included an item commending the gaoler, and another expressing indignation that the gaoler was using his own money to buy food for an indigent debtor, which it argued should have been the responsibility of the quarter sessions or the province.

⁶⁸⁴ Leeds and Grenville council papers, 1860 (5).

umbrage at their criticism, denying that the gaol was as “wretched as represented” and railing against the necessity of the significant alterations requisitioned.⁶⁸⁵

But resistance was not a monolithic response. The question of the appropriate degree of cooperation seems to have been a contested one, as is demonstrated by deletions and amendments to the committee reports, and conflicting reports by successive committees. The special committee eventually recommended that the inspector’s instructions be followed, only to be overruled by the Finance and Assessment committee. The negotiations took several years, and were hindered by the council’s voting an insufficient amount to begin the alterations, to the consternation of the commissioners, who were naturally hesitant to begin work without secure funding. They warned that the inspectors had threatened government action, in the form of suspension of the counties’ corporate status, in the face of municipal “contumacy.”⁶⁸⁶ Despite their ‘hard law’ status, this was the only sanction at the inspector’s disposal, a somewhat blunt instrument with which to secure compliance. Eventually the truculent warden, William Garvey, was replaced by the more tractable James Keeler, and the committee proffered an appropriate plan that was approved by the inspectors and provincial executive. Work was finally completed in 1863, at a cost of \$3921.20, half of which was to be borne by the province.⁶⁸⁷

The inspectors’ perspective excluded extraneous considerations, including the fact that counties did not have immediate access to unlimited or uncontested resources. In 1871 the Leeds and Grenville statement of assets and liabilities declared the number of ratepayers to be 9862, many of whom seem to have been regularly clamouring for economic infrastructure in the form of roads and bridges, which latter seemed to have the unfortunate habit of being destroyed by

⁶⁸⁵ Report of standing committee on property, 7 November 1860, Leeds and Grenville council papers, 1860 (3).

⁶⁸⁶ Report of commissioners, 13 October 1862, Leeds and Grenville council papers, 1862 (5).

⁶⁸⁷ Report of commissioners, 29 December 1863, Leeds and Grenville council papers, 1863 (5).

floods almost as fast as the council could build them.⁶⁸⁸ Although they were not entirely adverse to discretionary spending—they voted for improvements to the town square, at a cost of \$400, and, as noted in Chapter 5, paid their staff relatively generous salaries—for large outlays the councillors were forced to borrow; to finance the new gaol and registry office they incurred bank debt of \$4000 to provide for the anticipated expenditure of \$7500.00 over two years.⁶⁸⁹

Notwithstanding the council's capitulation, there was to be little peace on the gaol front. No sooner had the council agreed to the renovations than Inspector Meredith began to press them on the subject of proper diet for prisoners, and the addition of a small multi-purpose building to serve as a kitchen, both of which proposals gained the approval of a grand jury. Once again, William Garvey, who was property committee chairman as well as warden, initially refused point-blank. His successors, perhaps persuaded by Meredith's assertion that his proposal for feeding the prisoners a regulated diet provided by someone other than the gaoler would save money, took a more conciliatory stance, although they still balked at the additional building. Meredith had less success with a requirement for inmate clothing, which continued to be a point of disagreement. The property committees ignored his and those of his successor, J.W. Langmuir, not acquiescing on this issue until the mid-1870s, after several grand juries added their exhortations to that of the inspectors. However, no sooner did they do so than the

⁶⁸⁸ Statement of Assets and Liabilities for 1871, Leeds and Grenville council papers, 1871 (1).

This does not include the towns of Brockville and Prescott, which had separated from the counties, but which paid a proportionate amount for shared services according to contracts they entered into on separation. The council papers are full of requests for roads and bridges; and in the early part of the period the council's time and money was almost entirely committed to providing these facilities and schools. In 1862, the year the first addition to the gaol was paid for, at least eight bridges were destroyed or badly damaged by spring freshets.

⁶⁸⁹ A schedule based on returns to a circular of 8 September 1869 to all county wardens shows that Leeds and Grenville's assessed property of \$5,386,413 was close to the median. Lowest was Renfrew, with \$1,700,000, and the highest was York with \$14, 125,027; letter of Treasurer regarding plan to borrow funds, Leeds and Grenville council papers, no date, 1871(4). The gaol eventually cost closer to \$6000. The government subsidy was not paid in advance.

inspectors once again upped the standard in a circular of 1878, which advised that prison clothing would henceforth be purchased through the central prison at county expense.⁶⁹⁰

Nor did the money spent on the gaol building result in concord on that issue. After confederation, a new provincial inspectorate replaced the old Board. The newly renovated gaol, which had received the imprimatur of the provincial executive only a few years before, incurred the contempt of Meredith's successor, who announced in 1869 that, among other deficiencies, the "internal arrangements" of the gaol were "seriously defective."⁶⁹¹ Langmuir was particularly appalled by the dayrooms, which had not even been mentioned in previous discussions, but which he felt were much too crowded. One might assume from this that the prison population had increased, but in fact it was fairly stable, with eleven confined in 1869, one fewer than in 1856.⁶⁹² Langmuir's opinion seems to have been rooted in new professional ideals that privileged the 'classification' of prisoners by such categories as age, gender, mental competency, and the severity of the offense.⁶⁹³ Again, the property committee and council remained unconvinced.

The council did follow Langmuir's suggestions as to baths and padlocks, but did so only after those improvements had been endorsed by grand juries. Similarly, once the grand juries took up the mantra of classification and stressed the necessity for more commodious dayrooms, the committee and council finally accepted the new standard and agreed to invest in a significant

⁶⁹⁰ (To aid in prison discipline and deter escapes.) Circular from the Prison Inspector to sheriffs, 7 January 1878, Leeds and Grenville council papers, 1878 (3a).

⁶⁹¹ Report of Inspector J.W. Langmuir, 19 June 1869, Leeds and Grenville council papers, 1869 (5).

⁶⁹² Report of Prison Inspector J. W. Langmuir, 19 June 1869, Leeds and Grenville council papers, 1869 (5); Letter of Gaol Physician, 20 October 1856, Leeds and Grenville Papers, 1856(6). The numbers increased toward the end of the period, after the gaol had been rebuilt, with the committee on property reporting 29 in 1875 and 21 in 1878; Leeds and Grenville council papers, 1875(2), 1878 (8).

⁶⁹³ One of the core tenets of the nineteenth century prison reform movement, classification, ostensibly part of the trend toward rehabilitation, was also "born of a desire to limit the spread of moral contagion:" Norval Morris and David J. Rothman eds., *The Oxford History of Prisons: The Practice of Punishment in Western Society* (Oxford, New York: Oxford University Press, 1998), 97. See also Oliver, 'Terror to Evil-Doers', 198, 357.

revamping and extension of the building, along with a new registry office (pursuant to the demands of another provincial inspector). Thereafter, the grand juries moved on to related causes, inveighing on the problem of ‘incurables’ and the desirability of a House of Refuge for the counties.⁶⁹⁴

During all this time the property committees continued to recommend payment for minor repairs, as well as stoves and furnishings for the courthouse, registry office, and municipal and judicial offices. Most of those requests seem to have been accepted without much difficulty by the finance committee and the committee of the whole. As with the grand jury recommendations, it often took several reports before a property committee’s more expensive recommendations would be accepted. It is arguable, then, that it was an aversion to capital expenditure and a structure of decision making that required a proposal to pass several levels of scrutiny, in each case vulnerable to competing factions and priorities, coupled with a lay rather than professional perspective, and not a lack of interest or innate miserliness that was the cause of the divergence between councils and inspectors. The grand jury seemed to occupy a middle ground, representing the standards of the ‘respectable’ parts of the community, which, though they rose continually during this period, were mitigated by local knowledge, and would by definition never match the inflationary ideals espoused by the professionals.

Conclusion

The grand jury in mid-Victorian Canada West/Ontario was a legal institution that defies easy categorization or hierarchic placement, intersecting in various ways with judicial, administrative, and executive branches of government at both high and low levels. At the higher end of the

⁶⁹⁴ No such project was begun until after the period under review.

governance spectrum, grand jury presentments may have had indirect ramifications for the policies, or at least the politicking, of the provincial and federal governments. There is no question that the grand jury of the quarter sessions had an important ongoing quasi-judicial role in the determination of eligibility and quantum of support for the ‘destitute insane,’ a group that at least in Leeds and Grenville they appear to have defined generously, and probably had influence on the institutional fates of particular individuals they identified as insane.

As far as matters of local governance are concerned, the imprint of those instruments of the old regime and new—the grand jury and the inspectors—cannot be easily disentangled. County councils were assailed by both bodies, not in concert, but often simultaneously and often also in counterpoint with gaolers, sheriffs, doctors, the press, and even their own members sitting in property committees. Indeed the most direct repercussions of the grand jury presentments may have been on the agendas and reports of those committees, which mimicked grand jury presentments on issues relating to the gaol, including the physical visit of the committee members to the premises, the commendation of the gaoler, the enumeration of the prisoners (which made sense for the grand jury in the context of general gaol delivery but which was of doubtful relevance to municipal administration), and the eliciting of prisoners’ opinions as to their treatment.

The effects of even the ‘hardest’ of laws and legal institutions are notoriously resistant to measurement. With the possible exception of maintenance orders for the destitute insane, the non-criminal presentments of the grand juries in mid-Victorian Canada West/Ontario lacked an enforcement mechanism. This does not mean that they were necessarily ineffective, or at least any more ineffective than the new professional, centralizing and bureaucratic organs of administration. The experience of the United Counties of Leeds and Grenville may not have been

typical, but there is no reason to think that it was exceptional. In these counties, as we have seen, the record is unclear, but suggests that the municipal council was just as, or more, likely to be influenced by the opinions of grand jurors on gaol-related issues. In this case grand jury presentments can be seen as a nineteenth-century variety of soft law, where the norms expressed were imprecise yet consequential, those of the most prosperous, male members of the local community on whatever subject was raised by the judge, institutional convention, or circumstances. While other forms of low law underwent drastic transformation and innovation, the presentment function of the grand jury was merely adapted to the context of the new regime as the press, judges, and grand jurors themselves continued to find purpose in a 'soft' old regime institution.

Between the old and new systems of supervision, the municipal county councils of Canada West/Ontario during the thirty years after the Baldwin Act were never left alone to exercise the power the statute gave them over local correctional facilities. Still, though not unmolested, they were able to exert considerable agency. The oversight of the grand juries, though legitimated by tradition and the social standing of its members, was indeed 'soft;' in the case of Leeds and Grenville, as we have seen, grand jury recommendations could not be ignored indefinitely, but action and expenditure could be deferred. As for the inspectors, their surveillance was sporadic, and their victories long fought and hard won. The municipal council of the United Counties of Leeds and Grenville was sometimes active, sometimes passive, in the defence of its independence. But in this area at least, its autonomy, and to a certain extent its agency as well, was clearly compromised by the will of the legislature through its bureaucrats, and the judicial system through its lay participants.

Chapter 7: A Sphere of Autonomy: Taxation Appeals in Three Townships of Canada West/Ontario, 1850-1880

The power to tax has often been recognized as fundamental to state power and state formation.⁶⁹⁵

While the colony of Upper Canada also raised funds through customs (shared with, and collected at, Lower Canada), fees and licences, and imperial subsidies, locally administered property taxes formed the greater part of government revenues from the first settlement of the province.⁶⁹⁶

Local 'rates' financed the roads, bridges and markets crucial to the development of an agricultural economy, as well as public buildings and the salaries of local officials.⁶⁹⁷ In keeping with the colonial policy of top-down, non-democratic governance, setting and administering

⁶⁹⁵ See generally Glenn W. Fisher, *The Worst Tax?: A History of the Property Tax in America* (Lawrence, Kan.: University Press of Kansas, 1996), 245; Niall Ferguson, *The Cash Nexus: Money and Power in the Modern World, 1700-2000* (New York: Basic Books, 2001); Margaret Levi, *Of Rule and Revenue* (Berkeley: University of California Press, 1988); Dennis Hale, "The Evolution of the Property Tax: a Study of the Relation between Public Finance and Political Theory," *Journal of Politics* 47 no. 2 (1985): 382-404; Andrew Smith, "Toryism, Classical Liberalism, and Capitalism: The Politics of Taxation and the Struggle for Canadian Confederation," *Canadian Historical Review* 89, no.1 (2008): 1-25; John B. Legler, Richard Sylla, and John J. Wallis, "U.S. City Finances and the Growth of Government, 1859-1902," *Journal of Economic History* 48, no. 2 (1988): 347-56; Stuart Landon and David L. Ryan, "The Political Costs of Taxes and Government Spending," *Canadian Journal of Economics* 30, no.1 (1997): 85-111; Carolyn Webber and Aaron B. Wildavsky, *A History of Taxation and Expenditure in the Western World* (New York: Simon and Schuster, 1986).

⁶⁹⁶ For the history of taxation at the federal and provincial levels post-confederation see E. A. Heaman, *Tax, Order and Good Government: A New Political History of Canada, 1867-1917* (McGill-Queen's University Press, 2017). Heaman provides a useful glossary of tax terms and concepts: 465-70. For the twentieth-century see Shirley Tillotson, *Give and Take: The Citizen-Taxpayer and the Rise of Canadian Democracy* (Vancouver: University of British Columbia Press, 2017). See also J. Harvey Perry, *Taxes, Tariffs, & Subsidies: A History of Canadian Fiscal Development* (Toronto: University of Toronto Press, 1955). The law (but not much history) of municipal taxation is the subject of *Assessment and Rating: Being the Law of Municipal Taxation in Canada*, 4th ed. by Harold Ernest Manning (Toronto: Canada Law Book Co., 1962). An act-by-act account is to be found in Ontario, Commission on Municipal Institutions, *Reports of the Commission on Municipal Institutions* (Toronto: Warwick & Sons, 1888), Municipal Commission and Ontario Legislative Assembly, *Sessional Paper no. 13* (Second Report of the Municipal Commission, 1889). For the legal transformation of the physical environment see J. David Wood, *Making Ontario: Agricultural Colonization and Landscape Recreation before the Railway* (Montreal; Kingston; London: McGill-Queen's University Press, 2000).

⁶⁹⁷ On the pre-eminence of agriculture in Upper Canadian economic development during this period, see McCalla, *Planting the Province*, Douglas McCalla and Peter George, "Measurement, Myth and Reality: Reflections on the Economic History of Nineteenth Century Ontario," *Journal of Canadian Studies* 21, no. 3 (1986): 71-86; Ian M. Drummond, *Progress without Planning: the Economic History of Ontario from Confederation to the Second World War* (Toronto: University of Toronto Press, 1987).

property taxes had been the *métier* of appointed justices of the peace meeting in district courts of general quarter sessions.

Townships had been the basic geographic unit in Upper Canada since the colony was opened up for settlement in the late eighteenth century, but their utility for local government purposes had been had been forsworn by Upper Canadian governors, their local Tory supporters and superiors in the colonial office and above, who feared they could be a lightning rod for revolutionary republicanism.⁶⁹⁸ Eventually annual township meetings had been allowed for the limited purpose of selecting local officials—clerks, road overseers, pound-keepers, assessors, collectors and fence-viewers—and later to vote on the appropriate configuration of fences and animal control. The transformation of townships from this negligible position to one of the key components of the system of low governance was one of the most significant of mid-nineteenth century reforms. By the Baldwin Act, townships were automatically incorporated. Led for the first time by elected councils, they were given many of the powers over local administration and development that had been most recently exercised at the district or provincial levels.⁶⁹⁹ Most significantly, the ability to raise taxes from the rural majority was taken from the justices of the peace by the act and its companion statute, the Assessment Act of 1850, and transferred to the township, rather than the county.⁷⁰⁰

As we have seen, historians are divided as to whether the Baldwin Act gave meaningful autonomy to local governments, and the argument that the reforms were in fact a thinly disguised

⁶⁹⁸ See Glazebrook, "The Origins of Local Government," Isin, "The Origins of Canadian Municipal Government," David Siegal, "Local Government in Ontario," in *The Government and Politics of Ontario*, ed. Donald C. MacDonald (Toronto: MacMillan Canada, 1990); Aitchison, "The Development of Local Government in Upper Canada," Virgil Martin, *Changing Landscapes of Southern Ontario* (Erin, Ont.: Boston Mills Press, 1988).

⁶⁹⁹ See Chapter 2.

⁷⁰⁰ As the (roughly) equivalent jurisdiction to the district. *An Act to establish a more equal and just system of Assessment in the Several Townships, Villages, Towns and Cities in Upper Canada*, 13 & 14 Vic. c.67 [hereafter Assessment Act, 1850].

instrumentalist project, designed primarily to increase economic growth rather than to bring self-rule to the local community for its own sake, is a persuasive one. Following this line of interpretation, it can be surmised that the township was chosen as the most effective jurisdiction to extract revenue from the rural majority, on the expectation that township councils would apply the proceeds to the purposes of local infrastructure and thereby enhance market development. Township councillors were empowered to decide on the amount of tax to levy to meet the county requisition and their own estimates of need for local purposes, and to appoint, pay and regulate the part-time employees who would do the evaluations and collections. Furthermore, township councils were given the jurisdiction, previously exercised by the courts of quarter sessions, to hear appeals by taxpayers from these tax assessments when sitting as ‘courts of revision.’ These infant tribunals can be seen as an early Upper Canadian manifestation of the transformation in adjudication from judicial to administrative institutions which marked the evolution of law in English-based jurisdictions in the nineteenth and early twentieth centuries.⁷⁰¹ As discussed in Chapter 5, even in their regular business, in deciding what projects to fund and, in the case of taxation, what ratepayers to relieve, the councils can be seen as quasi-judicial in function if, as elected bodies, not in form.

The economics of the assessment and resource-allocation processes and the mechanics of enforcement are beyond my present focus. Rather, it is the politico-juridical aspect of the early Ontario township council as tax tribunal that is the subject of this chapter. I investigate the management of tax appeals by councils acting both in their regular capacity and as courts of revision in three townships in the United Counties of Leeds and Grenville, namely the Front of Leeds and Landsdowne, the Rear of Leeds and Landsdowne, and Augusta Townships during the

⁷⁰¹ H. W. Arthurs, *Without the Law*.

period 1850-1880.⁷⁰² The first two of these were chosen for the comprehensiveness of their council minutes, which extend almost unbroken through the entirety of the period. While its minutes are extant mainly for the latter part of the period, Augusta has a fairly comprehensive set of surviving by-laws for the entirety of the period.⁷⁰³

I do not claim that these three municipalities were necessarily representative of Upper Canadian townships of the time. But even though a small sample cannot provide definitive answers, it can suggest some preliminary ones to several inter-related questions. If the premise of mandatory municipal incorporation as a strategy for economic development is correct—and if the alleged strategists were at all prescient—it could be expected that the three councils would demonstrate a tendency to pragmatic resource-maximization. Did these councils act as “predatory rulers,” as Margaret Levi has argued is characteristic of taxing authorities throughout history?⁷⁰⁴ What of the political concerns of councillors who depended on election for their position, which Levi concedes can be a tempering factor in the drive to extract revenue?⁷⁰⁵ Townships under the Baldwin Act were ‘ratepayer democracies.’⁷⁰⁶ With the exception of

⁷⁰² AO, Augusta Township Fonds 1523, Council Minutes 1523-1, MS 337 Reels 1-2 [hereafter Augusta minutes]; AO, Township of the Front of Leeds and Landsdowne Fonds, F 1668, Council Minutes F 1668-1 MS 614 [hereafter FoLL minutes], AO, Township of the Rear of Leeds and Landsdowne Fonds, F 1889, MS 615-1 [hereafter RoLL minutes].

⁷⁰³ Although there are lacunae, including missing metadata; AO, Augusta Township By-laws, F 1523-2, MS 337-2. Unfortunately, assessment and collectors’ rolls have not survived for these jurisdictions, so specific linkages are not possible, but samples were consulted from other townships and from Gananoque, a village in the Rear of Leeds and Landsdowne. Cases from Ontario Reports were also consulted, accessed by keyword searches (i.e. ‘court of revision,’ ‘Assessment Act,’ ‘statute labour’) limited by date and jurisdiction.

⁷⁰⁴ Margaret Levi writes: “Rulers rule.... They both inherit and create policies that allocate state resources....One major limitation on rule is revenue, the income of the government. The greater the revenue...the more possible it is to extend rule....I hypothesize that rules maximize the revenue accruing to the state subject to the constraints of their relative bargaining power, transaction costs, and discount rates....[I] assume[s] all actions are rational and self-interested...[and] that actors who compose the state have interests of their own, derived from and supported by institutional power. Rulers may sometimes, even often, act on behalf of others. Nonetheless, they are not simply handmaidens of the dominant economic class...Rulers are predatory in that they try to extract as much revenue as they can from the population...:Levi, *Of Rule and Revenue*, 2-3.

⁷⁰⁵ See also Landon and Ryan, “The Political Costs of Taxes and Government Spending,” 85-111.

⁷⁰⁶ See Webb and Webb, *The Development of English Local Government, 1689-1835*, especially vol. 1 part 1, The Parish. On the relevance of the fiduciary principle in this context, see J. Adler, “Incommensurable Values- Local Government and Judicial Review,” *Public Law* (2001): 717-31.

propertied women, who paid taxes but did not vote, constituents and taxpayers were identical sets.⁷⁰⁷ Elections were held annually, and the ballot was an open one until 1875; do township councillors seem to have been sensitive to the rights (and interests) of their constituents, and if so, was this sensitivity selective?⁷⁰⁸ David Murray has argued that the quarter sessions of the peace of the Niagara district in the pre-reform period were markedly legalistic in their administrative processes and bureaucratic in their attitudes; recurring conflicts arose between local supplicants and cold hearted and tight-fisted magistrates.⁷⁰⁹ Were elected politicians in these townships moved by non-fiscal or extra-legal considerations?

The Law of Municipal Taxation in Canada West/Ontario

Called the ‘worst tax’ by Glenn W. Fisher, the Anglo-American property tax has a long and contentious lineage. In the land-based gradations of feudal obligation, Dennis Hale has found the origins of such principles of assessment as reference to ability to pay and decentralized administration, and the chronic tension between pragmatism and policy.⁷¹⁰ The ‘rate’ on property was literally a fraction of the value of one’s property determined either by investigation

⁷⁰⁷ Eligibility was derived from ownership of a property interest, not residency.

⁷⁰⁸ Canada. Elections Canada. and Canada. Public Works and Government Services, *A History of the Vote in Canada* (Ottawa: Minister of Public Works and Government Services Canada for the Chief Electoral Officer of Canada, 1997), 43. For the extreme consciousness of politicians of the wishes of various factions of the voting public, see generally John Garner, *The Franchise and Politics in British North America, 1755-1867* (Toronto: University of Toronto Press, 1969).

⁷⁰⁹ Murray, *Colonial Justice*, especially chapter 6, “The Cold Hand of Charity,” 107-130.

⁷¹⁰ Fisher, *The Worst Tax?* As revealed by the question mark in the title, Fisher is ambivalent about the property tax. He accedes to the correctness of the charge that “it sins against the cardinal rules of uniformity, or equality, and of universality of taxation [and i]t puts a premium on dishonesty” but also is of the opinion that it is the basis for local autonomy (which he considers a self-evident good), 4-5; Hale, *The Evolution of the Property Tax*. For local governance by the “rulers of the county” see Webb and Webb, *The Development of English Local Government, 1689-183*, vol.1 part 2, The County, and David Eastwood, *Government and Community in The English Provinces, 1700-1870* (New York: St. Martin's Press, 1997); see also Eastwood, *Governing Rural England*, 34.

(inevitably unpopular), or voluntary disclosure (inevitably inefficient), and either way vulnerable to corruption, as well as expensive to administer and enforce.⁷¹¹

Americans entrenched property taxes in their state constitutions and uploaded revenue from localities to pay for centralized services, but with minor exceptions Upper Canadian governments chose to download both responsibilities and the means to fulfil these to the local level. The governing bodies of the thirteen colonies had relied heavily on property taxes, but also experimented with various other types of tax instruments, including income, ‘faculty’ and poll taxes.⁷¹² The latter two were eschewed by Upper Canadian governors in favour of taxation on real and personal property.⁷¹³ Although income taxes were included as an incident of personal property from time to time, including the period under review, they were notoriously hard to ferret out.⁷¹⁴

Another staple of the Anglo-American taxation system, mandatory road work, or ‘statute labour,’ was also relied on from the earliest assessment statutes in Upper Canada. Man and animal power were far more plentiful than currency, and roads were crucial to progress, and indeed to survival for European settlers. By 1850 monetary commutation was allowed, and indeed required for non-resident owners. This taxation in kind was an incident of property tax,

⁷¹¹ Hale, *The Evolution of the Property Tax*, 382-404; J. V. Beckett, "Local Taxation in England from the Sixteenth Century to the Nineteenth," *Local Historian* 12, no. 1 (1976): 7-12; George Charles Sumner Benson, *The American Property Tax: Its History, Administration, and Economic Impact* (Claremont Calif.: 1965); Martin Donahue, "The History of Administrative Law in Massachusetts, 1629-1932," *Journal of Legal History* 8, no. 3 (1987): 330-66.

⁷¹² Edward T. Howe and Donald J. Reeb, "The Historical Evolution of State and Local Tax Systems," *Social Science Quarterly* 78, no. 1 (1997): 109-21. A faculty tax is a tax based on one's profession or occupation. A poll tax, also known as a head tax, is a tax per person (variously defined as citizen, adult, or individual). See also Benson, *The American Property Tax*; Fisher, *The Worst Tax?*

⁷¹³ As Niall Fergusson points out, a property tax is the "natural tax for a primarily agricultural society:" Ferguson, *The Cash Nexus*, 65.

⁷¹⁴ For example, the Village of Gananoque assessment rolls for 1864 indicate that only one inhabitant disclosed income over £100 to be included in his personal property as the statute required. William Robinson, collector of customs, was assessed on income of £150. This income would have been public as part of the civil list. Town of Gananoque Assessment and Collector's Rolls, AO, F 1672, MS 613 [hereafter Gananoque Rolls], 1864. See John Joseph Wallis, "Constitutions, Corporations, and Corruption: American States and Constitutional Change, 1842-1852," *The Journal of Economic History* 65, no.1 (2005): 211-56; Fisher, *The Worst Tax?*

since real property owners (including women) were assessed for statute labour according to a graduated scale. However, it was also partly an indirect poll tax, since all male residents between the years of twenty-one and sixty were liable for road service whether they owned real property or not.⁷¹⁵

Valuation or ‘assessment’ of property for the purposes of determining the amount each taxpayer would pay (when the ‘rate’ was applied to the assessed value) took place every year. Until the act of 1850, Upper Canadian assessors had to rely on the property owner’s self-assessment. Thereafter, assessors were still dependent on ratepayers’ valuation of non-visible personal property, but for real property and visible chattels were empowered to make their own evaluation.⁷¹⁶ This development naturally put a greater premium on the recruitment of competent personnel.⁷¹⁷ The legislature and local councils experimented with methods of payment for assessors and collectors, which were distinct offices. For most of the years canvassed, all three of the townships reviewed here paid their assessors a flat fee, but paid their collectors a percentage of the amount collected. The system was designed to be arbitrary, with no discretion at the level of bureaucracy; leeway was for the courts of revision.

As noted above, a major change to the assessment framework with the 1850 Assessment act was the inclusion of this ‘court,’ a five-man committee of the township, town, village or city

⁷¹⁵ See for example *An Act to consolidate the Assessment Laws (Upper Canada)* 16 Vic. c.182 (1853) [hereafter Assessment Act, 1853], s.36, in which the lowest possible requirement was two days, rising to twelve days for someone with an assessed value of £1000, with an additional day for each £100 above this amount. There was no maximum. Little has been written on this important aspect of pioneer life. For a geographer’s view, see Robert Summerby-Murray, "Statute Labour on Ontario Township Roads, 1849-1948: Responding to a Changing Space Economy," *The Canadian Geographer* 43, no. 1 (1999), 36-52.

⁷¹⁶ Quarter Sessions records indicate that issues of ownership and value of livestock and machinery were contested in the years prior to 1850. See Leeds and Grenville United Counties Court of General Sessions of the Peace Minute Books, AO RG 22-12-0-9 minutes 1845-1869 MS 699 Reel 2.

⁷¹⁷ John Niblock, the appointed assessor for 1850 for the Township of the Rear of Leeds and Landsdowne, resigned one month after his appointment, citing his lack of confidence in his ability. He was replaced by one of the recently appointed auditors, Samuel Green, who agreed to the change “[i]t being your [council’s] wish.” RoLL minutes, 23 March 1850. Niblock (or Neblock) became collector, presumably a less exacting post.

council, to hear appeals from the assessor's decisions.⁷¹⁸ For most townships during this time period, the composition of the council and court were probably identical, as the minimum number of councillors was also five. The consolidation of 1853 went into greater detail on the court, as on other aspects of the assessment process. Subject to a few minor amendments, this version was the statutory framework throughout the period under review. The scope and purpose of the court, now referred to as the court of revision, was set out in Section 26, which stated that if a ratepayer was

wrongfully inserted on or omitted...or undercharged or overcharged....he or his Agent may....give notice in writing to the Clerk....and the Court after hearing the complainant and the Assessor...and any witness...upon oath, shall determine the matter and confirm or amend the Roll accordingly, and if either party shall fail to appear either in person or by agent, such Court may proceed ex parte...and if any Municipal elector shall think that any party has been assessed too low or too high, or has been wrongfully inserted on or omitted from the Roll, the Clerk shall... give notice to such party and to the Assessor... and the Roll as finally... certified...shall bind all parties..., and the Clerk of the Municipality shall post up in some convenient and public place...a list of all complainants on their own behalf against the Assessor's return, and of all complainants on account of the assessment of other parties....⁷¹⁹

Other noteworthy provisions included a right of further appeal on questions of fact to the judge of the county court, a stipulation that false declarations to the court were to be punished as perjury, and power for the court to adjourn, provided the roll be "finally revised by the first day of June in every year."⁷²⁰ Enforcement was to be by distraint, and if no goods were available, or the party was a non-resident and arrears (with 10% interest) had accumulated for five years, the county treasurer could direct the sheriff to hold a sale by public auction.⁷²¹ Penalties were also provided for officers failing their duties under the act.⁷²² Every property owner was permitted a

⁷¹⁸ Assessment Act, 1850 s.28.

⁷¹⁹ Assessment Act, 1853, s.26.

⁷²⁰ Assessment Act, 1853, ss. 28, 27, 30.

⁷²¹ Assessment Act, 1853, ss. 42, 50, 53, 55-57.

⁷²² Assessment Act, 1853, s.77.

basic exemption, and various officials and clergymen were granted further exemptions.⁷²³ As in prior acts, some provision was made for discretion. The court of revision could extend time for payment until March and could

receive and decide upon any Petition from any party assessed [and]...from any party who from sickness or extreme poverty shall declare himself unable to pay the taxes, or who by reason of any gross and manifest error in the Roll as finally passed by the Court, shall have been overcharged more than 25% on the sum he ought to have been charged, and to remit or reduce the taxes due by any such party, or to reject such Petition, as to them shall seem meet and right....⁷²⁴

Although schedules set out the format for the assessment roll and notice, no direction was given to the court as to the form of record to be kept.

Nor was there any explicit provision made for appeals *from* the county court, the decision of which was declared by the act to be final, but it was not long before cases began to make their way into the Court of Queen's Bench.⁷²⁵ In 1852, refusing to contemplate even the possibility of a *mandamus* in the circumstances, Chief Justice Robinson held that by virtue of giving jurisdiction to find assessment values as a matter of fact to the court of revision, and allowing alteration only by the county court, the legislature had intended that the opinions of the superior judges on this point were not permitted.⁷²⁶ Later cases would carve out exceptions to this hands-off approach, however. Territorial jurisdiction was to be respected and terms were not to be given interpretations that would most prejudice the taxpayer, who was also held to be entitled to notice and the right to be heard. Core elements of present day administrative law—the critical, albeit often problematic, distinction between matters of ‘law’ and ‘fact,’ and *audi alterem*

⁷²³ Presumably for reasons of public policy: Assessment Act, 1853, s.6.

⁷²⁴ Assessment Act, 1853, ss.37, 46, 29.

⁷²⁵ Presumably according to the regular process of appeals from county courts. The cases do not show much consciousness of the act's mention of finality as a bar to the hearing of the case. Rather, the issue seems to have been treated partly substantively, that is in determining the intent of the legislature, and partly through the doctrine of *ultra vires*.

⁷²⁶ *In re William Dickson and the Municipal Council of the Village of Galt* [1852] O.J. no. 85, 10 U.C.R. 395.

partem, the right to respond—were affirmed.⁷²⁷ Still, with few exceptions, the reported cases from this period continued to assert the right of democratically elected councils to act capriciously, partially, politically and arbitrarily, to favour residents over non-residents, and voters over business corporations, especially railway companies.⁷²⁸ Not surprisingly, given the natural skew of high court proceedings to the monied, most of these cases involved the larger urban municipalities and commercial interests. While part of the legal environment in which councils and courts of revision deliberated, these cases, exceptional by definition, cannot be relied on as reflective of circumstances in the townships.

Courts of Revision in Three Townships

The variations in legal culture to be seen in the records of the three townships can be attributed to the idiosyncrasies of their personnel (particularly their clerks, each of whom had his preferred style for the recording of minutes), as well as to precedents established by their founding members and kept alive through institutional inertia, and/or to differences in their socio-economic makeup. The Front of Leeds and Lansdowne and Augusta Townships had a head start with respect to European settlement, fronting as they did on the St. Lawrence River, and better quality—that is, more arable—land, although each had areas which were better than others, and inhabitants who were more established and prosperous than others.⁷²⁹ Leeds and Lansdowne

⁷²⁷ These principles, of course, did not originate with Robinson.

⁷²⁸ The bias of municipalities against non-residents and railway corporations was apparently a Pan-American phenomenon. See Robert Swierenga, "Land Speculation and Frontier Tax Assessments" *Agricultural History* 44, no. 3 (1970): 253-66: "Legal regulations to the contrary, it apparently was the practice in new counties for officials to assess nonresident lands 'a little higher' than those of settlers. Absentee land speculators may not have been innocent victims, but they were victimized." (266). See also Teafor, *The Municipal Revolution in America*, 152.

⁷²⁹ Donald Akenson has estimated that the total population of the Front of Leeds and Lansdowne in 1848 was 2,639 and that in 1851 the joint population of the Front and Rear of the townships was 4722. In 1871 the breakdown was Front, 5780, and Rear 2363, total 8,143: Akenson, *The Irish in Ontario*, 204; Glenn Lockwood also makes the point that there was a range of economic strata in the Rear of Leeds and Lansdowne, citing a photograph of children in front of their school, some well-dressed and shod and some decidedly not: Glenn J. Lockwood, *The Rear of Leeds & Lansdowne*, 189. The enumeration of Augusta for 1851 indicates a population of about 5,154. It was the second

had been laid out to be two regular, rectangular townships stretching back from the St. Lawrence, but as Glenn Lockwood has observed, history and geography interfered with this plan, and in the early days of the colony the townships were first united and then re-divided for local administration purposes by a horizontal zigzag following the Gananoque river system and a rocky barrier that impeded communication.⁷³⁰ The Township of the Rear of Leeds and Landsdowne had been settled somewhat later, and was generally rockier and less attractive, both materially and politically, having been the site of considerable political violence and conflict between American settlers and more recently arrived Orangemen.⁷³¹ Judging by the amounts each paid its officers, the township council of Augusta was the most financially well-off, followed by the Front of Leeds and Landsdowne and then the Rear of the same townships.⁷³² Augusta also had the greatest number of people presented to council as ‘poor’ or ‘indigent;’ not necessarily a contradiction since these are, of course, relative (and subjective) terms.⁷³³

Of the three, the Rear of Leeds and Landsdowne seems to have been the most casual about the holding of courts of revision. The council minutes confirm that these were in fact held, in entries of payment for advertising, printing, and serving notices and attendances by the assessor, legal advice procured in one case, and several terse motions that the roll be accepted “as revised.” But in only one of the thirty years under review did the clerk include more than the most cursory record of court proceedings. In most cases any accepted changes were noted

most populous township of the two counties: Ontario Genealogical Society Provincial Index, <https://www.ogs.on.ca/ogspi/5/5.htm>.

⁷³⁰ Lockwood, *The Rear of Leeds & Lansdowne*, 45. The division was maintained by the Baldwin Act for municipal purposes and remained in effect until 2001, when the two townships were merged (along with the Front of Escott) to become the Township of Leeds and the Thousand Islands.

⁷³¹ Akenson, *The Irish in Ontario*. Akenson writes that the two townships “became a sizeable bank of over 104,000 acres of what contemporaries viewed as second quality land” (50). See also Carol Wilton, “Lawless Law”.

⁷³² In 1876, a fairly typical year, the Front of Leeds and Landsdowne paid its assessors \$45 and \$50. The Rear of Leeds and Landsdowne had one assessor, who was paid \$80. Augusta had two assessors that year, each of whom was paid \$80.00.

⁷³³ Also one of the highest numbers of “Lunatic [sic], and Idiots” in the Canadas: *Census of the Canadas, 1851-2* (Quebec: Lovell and Lamoureux, 1855), 20.

directly on the assessor's roll. The time frames for sittings noted indicate that the proceedings did not tend to be lengthy. In many cases the minutes show the councillors adjourning to hold the court after lunch and reconvening as a council the same afternoon, with enough time left for the conduct of regular business (although some gaps in dates of meetings around the time required for meeting would have allowed for a lengthier session or sessions).

The one exception to the custom of proceeding without taking minutes in the court of revision in the Rear of Leeds and Landsdowne is an illuminating one. On April 17, 1852, it was moved that "council do now resolve and form itself into a revision court for the purpose of Revising the assessment Roll, and of hearing and determining on any Complaint that may be made relating to over and under assessment."⁷³⁴ After the councillors were sworn, the court proceeded to hear one case, that of Alonzo Washburn, who alleged that his real property had been assessed too low at £75. Seven witnesses were sworn, including one Henry Washburn. Henry was presumably a relative, but he was also superintendent for schools, and the other witnesses, who testified to valuations ranging from £100 to £185, were also members of the political elite of the township, either current, past or future councillors or officials. The inclusion of a witness list and court record, such as it is, in the township minutes are understandable when it is noted that Alonzo had just been elected a councillor of the township and the property threshold to hold this office was £100.⁷³⁵

To say that the records for the Front of Leeds and Landsdowne are more detailed would be an understatement, though these are still frustrating in that they leave out far more than they include. While the outcome is noted (i.e. case dismissed, appeal granted) it is impossible to tell

⁷³⁴ RoLL minutes, 17 April 1852.

⁷³⁵ It is not certain that the low assessment was politically motivated, but, perhaps significantly, the assessor was soon replaced: RoLL minutes, 17 January 1853. Alonzo was re-elected to council in 1853, 1854, and 1855. Another Washburn, Seneca, was also a long serving member of council.

exactly what the ramifications of each case were without the benefit of the notice of complaint on which it was based. Often it is unclear as to whether the appellant is asking that the assessment be decreased or increased, and whether the appellant is the property owner or another ratepayer. Nonetheless, the entries, while succinct, do give some intriguing glimpses into the process.

There seems to have been little regularity in the type of proof offered by the appellant and/or required by the court in the Front of Leeds and Landsdowne. Though the statute directed that testimony was to be sworn, and indeed it is likely that this is the reason the tribunal was called a court, sometimes ‘revisors’ (as the councillors in this capacity were sometimes referred to) seem to have taken the unsworn and unsupported word of an appellant or defendant, especially where the other party failed to appear. In other cases, witnesses or parties merely produced documentation, such as a lease or a deed, or were asked to provide a ‘certificate.’ Many appeals or complaints were dismissed for lack of evidence; on some occasions the lack of evidence was due to the absence of the complainant, on others to the complainant’s refusal to be sworn (presumably due to the fear of penalties for perjury), and on still others to a finding that the evidence offered did not in fact contradict the assessor’s opinion. When these did conflict and the assessor testified, his evidence seems usually, but not invariably, to have been preferred to that of the ratepayer. On several occasions the assessor himself acted as appellant, asking for corrections of his own mistakes, perhaps with an eye to forestalling the potential imposition of the penalties set out in the statute for negligence or fraud, or with an eye to maintaining his appointment.

Despite their lack of consistency on the necessity of oath-taking by witnesses, that the council members of the Township of the Front of Leeds and Landsdowne took the distinction

between the court and council seriously to some degree is indicated by a slight but significant divergence between court and council proceedings. When the council convened as a court, court-specific oaths were recorded as having been taken by each councillor as stipulated by the act, and the assessors were usually in attendance.⁷³⁶ Nor did the reeve automatically, or even usually, act as chair; the chairmanship of the court was decided on motion at the beginning of the session. These, like most of the decisions of the court, rarely required a vote. When an issue was put to a division, the clerk noted the fact and identified which councillors voted yeas or nays.

Because of the truncated character of the Front of Leeds and Landsdowne court of revision records, it is difficult to tell with what degree of rigor the revisors adhered to the letter of the law. Like their neighbours to the rear, they consulted lawyers periodically, and the minutes show that they purchased various municipal manuals (as did the other townships), so it cannot be assumed they were ignorant of, or hostile to, the relevant legislation. However, there are hints that they may have regarded the law as a starting point, rather than the be-all and end-all of their deliberations. In 1854, for instance, a resolution was made to exempt two clergymen from all or an additional part of their taxes. Limited statutory exemptions were available for church property and clergy income, but it appears that the court of revision chose to be more generous than was legally required, setting out for the record their belief that “according to the spirit and intention of the Law... all ministers of the Gospel should be exempt from taxation in as far as the Property in their possession is used and devoted to the purposes of their professions.”⁷³⁷

⁷³⁶ The minutes indicate that assessors were generally paid extra for court appearances. Usually there were two assessors for each township. They would not work in concert, however: each would be given a part of the township (i.e. Leeds or Landsdowne) to assess. It is easy to see that such a system could lead to disputes of valuation, especially near boundaries.

⁷³⁷ FoLL minutes, 1 May 1854.

Since it not clear exactly what relief was being requested and by whom, with the exception of requests to be exempted from all taxation for reasons of indigence, it is not possible to gauge the success rate of complaints to the court of revision of the Front of Leeds and Landsdowne. However, the numbers indicate that at least a few ratepayers in most years felt that bringing a complaint was worth the effort of filing the notice and time away from the farm. As the following table indicates, the incidence of complaints fluctuated considerably, from none in 1856, to over a hundred in 1874.⁷³⁸

TABLE 4: CASES BROUGHT TO COURT OF REVISION, FRONT OF LEEDS AND LANDSDOWNE

Year	Error, over/ under charge	Indigence	Dog Tax	Statute Labour	Other	Total	comments
1851							N/A
1852	6	2				8	
1853	7	4				11	
1854		2			2*	4	*Two clergy
1855		3				3	
1856		3				3	
1857						N/A	No record in minutes
1858		4				4	Record indicates a number of complaints were laid but that no one appeared.
1859						0	No complaints laid
1860	2	4			2*	7	*Customs house and unoccupied

⁷³⁸ Occasionally a case would be initiated on motion of one of the revisors, and it is unclear as to whether there was a prior complaint either in the format set out by the act, or otherwise. I have counted these motions as complaints.

							tenements wrongly assessed
1861	2	7			?*	9	*Unspecified number of tenant complaints for wrong method of assessment; adjourned to allow re-assessment, no decisions made by court on re- assessments
1862	1	9			1*	11	*appeal by executors of estate to be exempted— appeal accepted
1863						0	
1864	40*					4?	*3 of which may be double- counted; 3 by William Beatty re omissions from the roll including councillors; 22 by Asahel Keyes; at least 4 additional by Beatty
1865	4				1*	5	* Motion by revisors without initiation of complainant.
1866	7*		1			7	*At least one of which may be a reduction for indigence—record is unclear
1867	5					5	
1868	11					11	
1869	9		5			14	
1870						5	Possibly one additional claim heard June 13

1871	2					2	
1872	1					1	Plus one unclear as to whether a complaint made, or initiated by revisors
1873	1					1	
1874	103					103	Assessment act amended
1875	8					8	Plus one unclear as to whether a complaint made, or initiated by revisors
1876	2					2	
1877	5					5	
1878	5					5	
1879	20					20	Most re inappropriate abbreviations, blanks unfilled
Total all years						257	

Except in the cases of requests for exemption due to indigence, the determining variables in these numbers seem to have been more political than economic. This is not surprising, for the assessment process was critical to politics at every level. The local assessment roll determined eligibility for elections and office holding at the provincial/national as well as the municipal level, and the reported cases offer copious evidence that elections often involved court scrutiny of the property qualifications of the candidates and their supporters.⁷³⁹ At the beginning of this

⁷³⁹ See for example *The Queen ex rel. Metcalfe v. Smart* [1852] O.J. no. 12, 10 U.C.Q.B.R. 89. Before 1853, voters' lists were independent of the assessment roll: Canada. Elections Canada and Canada. Public Works and Government Services, *A History of the Vote in Canada*, 31. Election law was an important head of legal contestation, and earned

period, a (male 21 year old) freeholder or householder merely had to be listed on the collector's roll to vote in municipal elections, although he would have to be assessed for £25 to vote provincially. Later these thresholds were converted to \$100 and \$200 respectively.⁷⁴⁰ Whenever changes were made to the amount and type of property required to vote, there were new grounds to argue the assessment. In 1874, a banner year for the Front of Leeds and Landsdowne court of revision, the assessment act had been amended in several respects, most notably to include income from trade or profession as a qualifying category.⁷⁴¹ At the beginning of the period the superior courts had taken a hard line in matters of voting eligibility; in 1852 the Court of Queen's Bench decided that a voter who was qualified, but did not appear on the roll, could not be given a ballot.⁷⁴² This attitude was relaxed as time progressed, ending with general acceptance of the principle that the franchise was to be given a liberal construction and the voter given the benefit of the doubt, but problems continued to arise nonetheless.⁷⁴³

In the Front of Leeds and Landsdowne ratepayers took advantage of the statutory permission to challenge each other's assessment, presumably for reasons of personal animosity or partisan politics. The blip in numbers for the Front of Leeds and Landsdowne in 1864 may be due to the latter dynamic. Of the approximately thirty-three complaints, twenty-two were brought

its own considerable space in the case reports, as well as a variety of publications marketed to municipal officials as well as lawyers and judges.

⁷⁴⁰ Canada. Elections Canada and Canada. Public Works and Government Services, *A History of the Vote in Canada*, 31-33.

⁷⁴¹ *An Act to Amend and Consolidate the Law respecting the Assessment of Property in the Province of Ontario*, 22 Vic. c.26 (1874), ss. 4, 8, 9. Farmers' incomes had been specifically exempted from income tax since 1868-9. An amendment to this act (33 Vic. c.27) also extended the exemption to income from other forms of property which was not exempt. Harrison attributed this to the legislature's concern for fairness, in other words, no 'double dipping': Robert A. Harrison, *The Municipal Manual*, 3rd ed. (Toronto: Copp, Clarke, 1874), 526, note (r).

⁷⁴² *The Queen ex rel. Metcalfe v. Smart* [1852] O.J. no. 12, 10 U.C.R. 89: if the ratepayer was not on the roll, he was not qualified, despite having the requisite property.

⁷⁴³ In an 1874 reported case from Yonge township in the Counties of Leeds and Grenville, a Mr. McCulloch, who had taken possession of a farm after the assessment had taken place, appealed to the Court of Queen's Bench when the assessor and court of revision refused to change the roll and the county judge dismissed his appeal for a defect in form. *R. v. McCulloch (sub. Nom. Re McCulloch and the Judge of the County Court of the United Counties of Leeds and Grenville* [1874] O.J. no. 82, 35 U.C.R. 449, 5 C.B.R. 86 (Ont.QB).

by Asahel Keyes concerning the property assessments of others both as to inclusion and value. At least seven others were launched by William Beatty. The objects of Beatty's appeals included several parties by the name of Keyes, as well as several sitting councillors. It is impossible to tell what was behind this vendetta, but the politics of patronage may be part of the story.⁷⁴⁴ Beatty was a sometime township surveyor and a township overseer, both of which were part-time paid positions. More sought after were the posts of clerk, assessor and collector; indeed most of the (very few) contested motions of all three councils dealt with such appointments. The year before Asahel Keyes brought his appeals, the application of Ephraim Keyes had been turned down for the position of collector.⁷⁴⁵

Keyes began by challenging the entire roll, which challenge was (unsurprisingly) unsuccessful. His score was fourteen losses, six wins, two withdrawals, and one unclear. Beatty won five (four of which added councillor/revisors who had been omitted from the roll), lost one, and withdrew two. The hypothesis that some at least of these appeals were motivated by political rivalry is supported by the success of appeals of the four revisors (who did not recuse themselves). An earlier appeal by William Beatty against the assessment of Albert Keyes may also indicate a history of personal antagonism. Though the back story is murky, the denouement is fairly clear. Most of Keyes' complaints were dismissed; Beatty's were almost all accepted.⁷⁴⁶

⁷⁴⁴ For the ubiquity of patronage at every level, see Noel, *Patrons, Clients, Brokers*. For Lower Canada/Canada East see J. I. Little, *State and Society in Transition: the Politics of Institutional Reform in the Eastern Townships, 1838-1852* (Montreal: McGill-Queen's University Press, 1997).

⁷⁴⁵ FoLL minutes, 15 February 1859.

⁷⁴⁶ FoLL minutes, 5 August 1878. In 1864 it was established by testimony of George Taylor that Albert Keyes had been for some time living in Mallorytown, where he was a bailiff: FoLL minutes, 16 May 1864. Asahel Keyes next appears in the minutes in 1879, when he was elected to council, possibly as a "new broom"; his first motion was to reduce the compensation of councillors from \$2.00 to \$1.50 a day: FoLL minutes, 21 January 1879. Later that year, Thomas Kavanagh appealed against Keyes' assessment, asserting that "he had heard" that Keyes had "had notes due him and rents coming in to the amount of One Hundred Dollars." This hearsay was not accepted as "proper evidence."

Intriguingly, the appellants (or the clerk) in the Front of Leeds and Lansdowne often used the language of rights. Ratepayers were continually recorded as having demanded the ‘right’ to be assessed at a higher level. Contrary to the modern expectation that a taxpayer will only seek to avoid tax are many requests that an assessment be raised. Not all of these related to the various franchises. As the roll was open to the public, higher assessments may have conferred social status on the ratepayer. Numerous non-residents also specifically requested to be placed by name on the assessment roll. Not being named did not relieve one from tax. In addition to conferring the right to vote in the jurisdiction, voluntary enrolment could allow the taxpayer to perform statute labour, rather than pay the commuted amount required of non-residents, and perhaps to reduce discriminatory assessments; one American study has argued that the widespread perception that non-residents were “unfairly” assessed was not unfounded.⁷⁴⁷

This is not to say that there were not tax evaders. The minutes of all three townships as well as the court reports indicate that action was taken to collect taxes from recalcitrant ratepayers, and the collector’s rolls of Gananoque village show notations by the collector of property available for distraint.⁷⁴⁸ Many Front of Leeds and Lansdowne appellants asked that their assessment be reduced, or their names struck off the roll entirely. During the years that the township had a dog tax by-law, dog owners asked the court of revision to relieve them of this tax for various reasons, including the death of the dog (often apparently by the hand of its owner), that the dog had run away, or the ratepayer had never owned a dog. These were matters that must have been simpler to prove than the value of land; no such appeal was turned down by the court of revision. The court was also receptive to appeals by those ratepayers, often widows who

⁷⁴⁷ See Swierenga, "Land Speculation and Frontier Tax Assessments," 253.

⁷⁴⁸ See for example, Gananoque Rolls, 1864. Compare Township of Reach Collector’s Rolls, AO, F 1888, MS 61 (14), Township of Otonabee assessment and collector’s rolls, AO, F 1847, MS 619 (1).

would not have been allowed to vote in any event, who appealed for exemptions for reasons of poverty and/or ill health as explicitly permitted by the legislation. It may be that these matters were accepted by revisors who were also neighbours as a matter of judicial notice; not one of these cases was refused during the years canvassed.

Proving land value was more problematic. The legislature vacillated as to whether an actual or imputed rental income should be the measure of assessable value in urban areas, but in the countryside the standard remained capital (market) value.⁷⁴⁹ Some ratepayers made a complaint but withdrew it on receiving an explanation of the assessor's reasoning. When property had not recently changed hands, the assessor and revisors seem to have made their decisions based on the value of property "in the vicinity," adjusted for the quality of the land, and the ratepayer could challenge the assessment on the same bases. It was the assumption of all that a rocky, swampy or otherwise non-arable tract should not attract the same taxes as a more productive or potentially more productive one, and that like cases should be treated alike.

Many complainants did not appear and their complaints were usually dismissed, but allowances were made in some cases, with no reason given for the indulgence. Witnesses could be penalized for failure to appear, but these particular courts of revision never seemed to exact these penalties, or to refer absentee witnesses for prosecution.⁷⁵⁰ The grounds for complaint were not always substantive. Often the matter was a question of a name spelled incorrectly. Perhaps such a minimal error might deprive someone of a vote, if the name was spelled differently on the voters' list. On two occasions the township/court of revision clerk himself complained, first respecting abbreviations used instead of full names, and secondly of headings left blank.⁷⁵¹ The

⁷⁴⁹ Manning, *Assessment and Rating: Being the Law of Municipal Taxation in Canada*, 6-7.

⁷⁵⁰ Assessment Act, 1853, s.30.

⁷⁵¹ FoLL minutes, 4 June 1877 ("on account of certain names being abbreviated in their spelling"); 9 June 1879, (headings of roll not filled out).

upshot of these complaints was that the clerk himself was retained—and paid—to fix the omissions.

On only one occasion was it clear that the Front of Leeds and Landsdowne revisors were dismissing a complaint on a technicality, a practice that had been roundly condemned by the Court of Queen’s Bench in *R. v. Cornwall*.⁷⁵² In that case, some seventy-seven potential voters had been disenfranchised, in what seems to have been a clear instance of political bias.⁷⁵³ It is not clear on the face of the record that the refusal of the court of revision for the Front of Leeds and Landsdowne to allow appeals brought in an incorrect format was similarly motivated. But as we shall see, the council regularly heard appeals in general council sessions and routinely struck or reduced taxes even after the assessment roll had been confirmed, so it is hard to avoid the inference that the councillors were being less than impartial. Also suspect is their treatment of the Grand Trunk Railway, which had little more success in the Front of Leeds and Landsdowne than it seems to have in other municipalities it traversed.⁷⁵⁴

As noted, councillors did not recuse themselves from the hearing of complaints regarding their own property, although usually they refrained from moving or seconding the judgment on these issues.⁷⁵⁵ Councillors were not always successful, or not fully successful in their own cases. In one such instance, Thomas Darling, long-standing member of council and former reeve, was refused an amendment, the court noting (in a rare explanation) that the assessor had already

⁷⁵² FoLL minutes, 28 May 1875; sub nom. *The Queen v. The Court of Revision of the Town of Cornwall*, [1866] O.J. no. 74 25 U.C.R. 286 (UCQB).

⁷⁵³ Among them was a James P. Whitney, likely the same of this name to later become premier of Ontario. See Charles W. Humphries “Whitney, Sir James Pliny,” *Dictionary of Canadian Biography*, at http://www.biographi.ca/en/bio/whitney_james_pliny_14E.html.

⁷⁵⁴ A search on Quicklaw of “railway” and “assessment” limited by year and jurisdiction finds a number of these, for the Grand Trunk and other railway companies. The three townships here reviewed did not partake in inter-municipal competition for railways. In fact, when railways appear in the minutes they are usually in an adversarial mode, having blocked or damaged roadways or fences.

⁷⁵⁵ If they had, the court would have presumably lost its statutorily stipulated five members.

reduced the assessment by \$100.⁷⁵⁶ Revisors also regularly adjudicated the appeals of their apparent relations, who seem to have been successful more often than not. Interestingly, there is little evidence of automatic capitulation to local big-wigs who were not municipally connected. Although an appeal by his father, the Honourable John, had been successful to the extent of an £1800 reduction, a claim by Herbert Stone McDonald, at that time deputy county judge and later (and with the approval of council) county judge, that his property had been valued higher than others in the vicinity was rejected.⁷⁵⁷

Some families seemed singularly unlucky (to put the most positive spin on it) in their dealings with the Front of Leeds and Landsdowne court of revision. Among these were the Galways, one of whom led a petition to fire the assessor.⁷⁵⁸ There are other hints of opposition toward the process and personnel. The Rear of Leeds and Landsdowne council posted a reward—a unique event for this township during this period—for the arrest of those responsible for torching the collector’s barn, and there is also evidence that some of the aggrieved took their cases to the county court for further argument.⁷⁵⁹ Still, in the Front of Leeds and Landsdowne, even more markedly than in the Rear of Leeds and Landsdowne and Augusta, assessors and collectors were often former or future councillors, and the stability of the membership of the

⁷⁵⁶ FoLL minutes, 18 May 1871.

⁷⁵⁷ The Honorable John McDonald is referred to as the “patriarch of the village [of Gananoque]” by Donald Akenson: Akenson, *The Irish in Ontario*, 287; Appeal by Hon. John McDonald, FoLL minutes, 18 and 19 April 1853, appeals by H. S. McDonald, FoLL minutes, 29 May 1876; Council support for appointment of H.S. McDonald as county judge, FoLL minutes, 31 July 1869.

⁷⁵⁸ The Galway name first appears in 1863, when a payment of \$5 to William Galway for acting as a returning officer was rescinded on a contested motion. He was paid \$3 as was the other returning officer. FoLL minutes, 2 February 1863. In 1871, a William Galway complained he had been assessed too high, without success. FoLL minutes, 18 May 1871. In 1873 James Galway petitioned council to change the Assessor for Leeds, which petition was not adopted (on motion): FoLL minutes, 1 March 1873. In 1874, Robert and William Galway each failed to appear, resulting in the dismissal of one case for which Robert was witness, and William’s own complaint: FoLL minutes, 1 June 1874. At the same court sitting, “the assessor for Leeds front state[d] to the court that he had omitted to assess...50 acres and that the property [was] occupied by James Galway....” (Although he was then assessed at \$200, which as has been noted, may have been a mixed blessing, or mixed curse, depending on one’s point of view.)

⁷⁵⁹ See, for example, the payment of assessors to attend at “Judge’s Revision Court” in Brockville and constables to serve notices for attendance at this court; RoLL minutes, 20 December 1866.

township council over the years suggests that here at least the personnel and process were accepted by the ratepaying electorate as legitimate, or at least unexceptional.

Though the Augusta court of revision minutes are only available for 1872 to 1880, during these years they exhibit similarities to those of the Front of Leeds and Landsdowne, including the variation in numbers, which oscillated even more severely in Augusta, as the following table demonstrates.

TABLE 5: CASES BROUGHT TO COURT OF REVISION, AUGUSTA TOWNSHIP

Year	Error, Over/ under charge	Indigence	Dog Tax	Statute Labour	Other	Total	Comments
1850							Minutes of council exist, but no court of revision appeals recorded
1872	157					157	Assessment Act amended to change property thresholds for determining amounts of statute labour, 1870-71
1873	3					3	
1874	95					95	Assessment Act amended, 1874 to change leasehold amounts
1875	14					14	
1876	8					8	
1877	154					154	Farmer's sons allowed to vote if parent's property greater or equal to twice the required property, provision passed in 1876

1878						?	missing
1879	3					3	
Total all years						434	

In the Augusta minutes the franchise factor is even easier to discern, as in many of the cases the clerk noted that the issue to be determined as whether or not the property in question was worth more or less than the \$200 threshold. The Augusta minutes may also show the effects of party organizing at the federal level; federal elections were held in 1872, 1874 and 1878.⁷⁶⁰ There were no fees set for bringing cases before the court of revision (although appeals to the county court did attract the usual court costs), so there was little financial disincentive to complain.

The payment of fees to agents may have been an additional optional cost. In Augusta, as in the Front of Leeds and Landsdowne, landlords routinely appeared for their tenants and sons for their fathers and vice versa. The non-related agents who appear in the Augusta minutes seem to have made a general practice of appearing for others to whom they do not appear to be related. An intriguing case in Augusta appears to point to party organization and possible professional rivalry. In 1877, John B. Checkley, a frequent appellant on behalf of others of no apparent relationship, was able to oust ninety-four appeals filed by Sidney Row, another even more frequent and apparently equally disinterested participant, on the ground that Row was not at the time “a legally qualified elector of this municipality.”⁷⁶¹ Although lawyers did appear at courts

⁷⁶⁰ Parliament of Canada, History of Federal Ridings, General Elections, <http://www.parl.gc.ca/information/about/process/house/>. Provincial electioneering was possibly a factor in 1875. Provincial elections were held during this decade in 1871, 1875, and 1879: Elections Ontario, Composition of Legislature following General Elections, <http://results.elections.on.ca/results/history/composition/default.jsp?flag=E&layout=G&rec=0&rec-page=10> I thank Doug Hay for suggesting a correlation between number fluctuations and the timing of elections.

⁷⁶¹ Augusta minutes, 1 June 1877. Another participant, William O’Brien, objected to the objection, to no effect. Row was identified as a landlord in other proceedings, but it seems he had no direct stake in most of the appeals for which he appeared.

of revision on larger cases in urban centres, it is likely that these advocates in Augusta were multi-tasking businessmen or clerks.⁷⁶²

As was the case in the other two jurisdictions, Augusta court of revision sessions seem often to have been held outside the statute-mandated dates. However, a measure of clerical professionalism can be discerned, beginning with the first meeting of the new corporation in 1850, and lasting into the eighteen-seventies. The Augusta court of revision minutes, although not much more detailed than those of the Front of Leeds and Landsdowne, are presented with greater neatness and uniformity, in quasi-chart form, with column headings for appellant, sworn witnesses, matter complained of, and outcome. A sense that the business was serious and consequential is also manifest in the refusal of one Augusta councillor to take the chair at the first day of court of revision proceedings in May of 1872: Mr. Chapman, nominated by Mr. Wilson, “objected on account of his not having had experience in a Court of Revision.”⁷⁶³

There are other interesting differences in the court of revision records of the two townships. Applications to exempt the old, ill, or poor from tax, which were a mainstay of proceedings for the Front of Leeds and Landsdowne court of revision, especially in the eighteen-fifties, when in some years they were the only matter considered by the court, do not appear at all in the Augusta minutes (and indeed are comparatively rare in Front of Leeds and Landsdowne court of revision minutes in the sixties and seventies), a disparity which requires explanation, or at least speculation. Hypotheses that Augusta, being better-off, did not include the marginalized among its residents, that the Augusta councillors had less sympathy for the poor, or that Front of Leeds and Landsdowne either abandoned the indigent or that indigence ceased to exist in Front

⁷⁶² Neither of them appears as a lawyer in any of the Leeds and Grenville records or elsewhere. Checkley does not seem to have had a position with the Township. Row was briefly a township auditor.

⁷⁶³ Augusta minutes, 20 May 1870.

of Leeds and Landsdowne would perhaps be reasonable if the court of revision records are taken in isolation, but would be erroneous. For the court of revision was but one iteration of council, and the distinction seems often to have been more one of form than of substance.

Contemplating the three township councils as administrative tribunals, the attitudes of councillors regarding their role as tax arbiters, especially regarding statute labour and exemptions for indigence, become both clearer and more nuanced.

Township Councils as Administrative Tribunals

Any thought that the municipal reforms brought about by the Baldwin Act resulted in a clean Montesquieu-esque division of government functions, with the Quarter Sessions retaining the judicial, and the municipal corporations the legislative and executive components, is dispelled by the post-reform records of both sets of institutions. Criminal trials took up proportionally more of the time of the Quarter Sessions after the partition, but quasi-administrative matters remained part of the proceedings.⁷⁶⁴ As I have shown was the case for the county councils of the United Counties, in the three townships here examined legislation was but a minute part of their work. In all three jurisdictions, by-laws were largely a *pro forma* step in administration, the ‘legalizing’ of routine acts, many of which concerned the annual appointments of township officers and the amount of their pay. There was some variation, but in all three townships, councillors seemed to regard their primary function as administrative. Although the Augusta minutes indicate that the township was moving to a more rationalized procedure, for the most part the proceedings of all three councils tended to the haphazard. This seems much in keeping with another, indeed a

⁷⁶⁴ For instance, naturalization applications.

defining characteristic of the councils, and one which brings them closer to present-day tribunals than present-day councils. That is, all three were essentially reactive as opposed to proactive.

With rare exceptions, council decision-making originated in one of two ways: either in institutional routine, or by ratepayer initiative. In the former category are to be found annual appointments, the levying of rates, and the implementation of mandated provincial or county programmes.⁷⁶⁵ Ratepayer requests for municipal expenditures, on the other hand, were regular in the sense that they were customary, but were rarely routine. The minutes of almost every meeting show ratepayers asking for municipal largesse of some sort, occasionally by letter, legal claim, or personal appearance, but most commonly by petition. In default of petitions from ratepayers, the Front and Rear of Leeds and Lansdowne, and to a lesser extent Augusta, merely divided their funds among the various school and road sections into which the township was divided. A ratepayer or group could “pray” for a departure from this spending model. These requests might be for extra funds to be spent on a particular road or school section, for the granting of a tavern licence to a particular applicant, for the adoption or rejection of a statutory or county level law, such as the Temperance Act or the Sheep Protection and Dog Tax Act, or for poor relief for an indigent neighbour.

Scattered within this *mélange* are to be found requests for exemption and variation of tax assessment. While the extreme numbers presented in some years to the courts of revision of the Front of Leeds and Lansdowne and Augusta are not present, a fairly steady stream of tax-related requests made their way to the three councils, as the following tables demonstrate.

⁷⁶⁵ By institutional routine, I mean annual business of approving appointments, paying bills etc. All these were done annually by by-law. Cooperative endeavours with the county council were rare. For example, a major road through the counties was macadamized by a joint effort. As members of the county council, the reeves and deputy reeves would have had direct input.

TABLE 6: TAX PETITIONS TO TOWNSHIP COUNCIL, FRONT OF LEEDS AND LANDSDOWNE

Year	Error, over /under charge	Indigence	Dog Tax	Statute Labour	other	Total	comments
1850				1*		1	*exemption for three years on completion of bridge
1851							
1852		2				2	
1853					1*	1	*unoccupied tenements (exempted by statute if unoccupied for 3 months or more)
1854		2				2	
1855		3				3	
1856		3		2*		5	*exemption offered in lieu of aid for sidewalk
1857							
1858	2	4		1		7	
1859							
1860		1				1	
1861		5		1		6	
1862							
1863		5		1		6	
1864	2	3				5	
1865	3	3	1	3	27 *	37	*arrears cancelled dog tax begins
1866		2	6	3	1*	11	*arrears

1867	3		6	1		7	
1868	3	1	9			13	
1869	2	1	4	2	4*	13	*from collector's roll, (3 as uncollectable)
1870	3	3	1*	10**	1 ***	18	*for prior year, dog tax ends **2 for indigence *** changes made on collector's roll
1871	5	2 (reduced)		4		11	
1872	5			2		7	
1873	1	1		9+		11+	
1874				11		11	
1875	7*	4		7	2 **	20	*includes remission of tax on steam mill and one refused because not brought to court of revision **Steam mill for 5 years and property burned)
1876	1			1*		1	*rescinded
1877	1						
1878	1			2		2	
1879	5	1		5		5	
Total all years						188	

TABLE 7: TAX PETITIONS TO TOWNSHIP COUNCIL, REAR OF LEEDS AND LANDSDOWNE

Year	Error, over/ under charge	Indigence	Dog Tax	Statute Labour	other	Total	comments
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1850	1					1	
1851	1			4*		5	*all indigence
1852	1			1		2	
1853							
1854				2 *		2	*1 indigence
1855				1*		1	* indigence
1856							
1857				7*		7	* all indigence
1858	2			2		4	
1859	1			7*		8	*6 indigence and/or small children and large families
1860				2		2	
1861	1			6*		7	*4 for indigence
1862				1		1	
1863	1			1		2	
1864							
1865				2		2	
1866	10		1		1*	12	*refund to clergy for parsonage
1867	6*		4	1		11	*3 for interest on back taxes
1868			6*	3		9	*1 claim rejected on legal advice
1869	3			1	1*	5	*refund to clergy
1870				1	1*	2	*by-law to remit part of lot
1871							

1872				1		1	
1873	6*			1		7	*3 re back taxes
1874	2			1		3	
1875	1					1	
1876				4		4	
1877	4*	1		1+	2 **	8	*1 back taxes ** lack of benefit from school taxes
1878	1*			1		2	*settlement for back taxes
1879				4		4	
Total all years						113	

TABLE 8: TAX PETITIONS TO TOWNSHIP COUNCIL, AUGUSTA

	Error, over/under charge	Indigence	Dog Tax	Statute Labour	other	Total	comments
1850							
1872					1 *	1	*mill destroyed by fire
1873	2					2	
1874				1+ unknown		1+	
1875		7		4		9	
1876							
1877	1	5			4*	10	*“lately burnt out”
1878	3	6		7		16	
1879		9*		2		11	*one for previous year
Total all years						50	

In skirting the courts of revision, were these requests illegal, or extra-legal? As I have noted, the statute did allow changes after the assessment roll had been confirmed and passed, in cases where there was a “gross and obvious error” of at least 25% over or under actual value. In no case do the minutes of any of the three townships show a finding of such error as a precondition of council making tax petition decisions, but they do not provide much detail on which to base any very firm conclusions in this regard. Most of the petitions for relief based on error seem to be similar to those brought to the courts of revision. One difference is that all apparently are matters of over- rather than undercharge, whereas in the court of revision minutes, as we have seen, undercharge appeared as a significant category of appeal. This is as might be expected. Council could (or would) vary tax liability, but the records show that often the changes seem only to have been effected by a resolution or passed motion sent by the clerk to the collector, in which case the assessment and collector’s rolls would not reflect the change. Since the rolls were authoritative for voting purposes, a claim for undercharge to raise the assessment to voting or candidacy level would have to be taken to the court of revision to achieve the desired end.

Though problems arising from transcription or errors of fact seem less prevalent in the petitions brought to council than the appeals to the courts of revision, these did occur. A ratepayer assessed twice (once by each assessor), or one who was assessed instead of another with a similar name could expect a sympathetic hearing even after the assessment roll had been passed. In only one case did the council instruct the clerk to inform a ratepayer that his appeal could not be entertained because the request should have been made to the court of revision.⁷⁶⁶

⁷⁶⁶ FoLL minutes, 13 December 1875.

Unfortunately the minutes do not reveal the reason for this refusal, that is, whether it was based on a finding that the alleged error was not “gross and obvious” or less than 25%, or whether the council was just asserting it was generally *functus*. If the latter, this was at best disingenuous, at worst, mendacious.

The assessment act did not make any mention of appeals of dog taxes brought after confirmation of the roll. In some cases, the inappropriateness of a dog tax was fairly clear-cut, where the ratepayer denied he had ever owned a dog. In more cases, however, the reasons for the petition were based on grounds of justice or mercy similar to those cited in the court of revision appeals. Thus councillors waived the dog tax in cases where it was alleged that the dog had died, been killed or somehow lost during the year following the making of the assessment. Stephen Wheeler of the Front of Leeds and Landsdowne, identified as an indigent blind man elsewhere in the minutes, was also exempted from this tax.⁷⁶⁷ Applications by ratepayers for relief for refunds or exemptions from the dog tax were almost uniformly successful in all three townships during this period. The one exception is telling: the request of Andrew McCardle to have his dog taken off the roll was apparently based on legal, rather than equitable grounds. His petition was held over to the next meeting to allow the Reeve to seek legal advice; on this being in favour of the assessment, the petition was denied.⁷⁶⁸

No exceptions to liability for dog tax were included in the governing legislation, nor in the one by-law on the subject which is extant for these townships.⁷⁶⁹ Similarly, councillors remitted property taxes for ratepayers whose property had been burned, another extenuating circumstance on which the legislation was silent. It could be argued that the council was merely

⁷⁶⁷ FoLL minutes, 18 January 1869.

⁷⁶⁸ RoLL minutes, 6 May and 15 September 1868.

⁷⁶⁹ FoLL By-laws, #189 (no date).

proceeding by analogy, as the legislation did allow an exemption for property which was under water. However, it seems more likely that the councillors were using an extra-legal discretion to relieve from injustices arising from arbitrary rules. Clemency in these cases can be seen as a competing public policy.

Exemption from statute labour might be seen as even more legally dubious, as the legislation specifically forbade municipalities from reducing the statutory minimums for statutory labour.⁷⁷⁰ Ratepayers brought statute labour issues to council in all three jurisdictions. Some of these related to errors of fact, especially as to whether or not the work had been done. Road overseers were supposed to provide records, but this requirement was often flouted.⁷⁷¹ Again, almost all these petitions were successful. One was specifically granted “in part;” one which had been granted was rescinded (possibly because of an ongoing claim against the municipality by a family member of the petitioner). Only one was contested, as the council debated whether Samuel McCammon’s claim to have fulfilled his obligations should be accepted.⁷⁷² (The fact that McCammon was a lawyer may have been a factor in this unusual manifestation of doubt.)

The township councils of the Rear of Leeds and Landsdowne regularly exempted ratepayers from statute labour for reasons of indigence, especially in the early part of the period. An Augusta by-law, setting out the procedure for statute labour and the supervision by overseers specifically allowed an exemption for inability to perform to those who “due to old age, sickness or numerous family or misfortune may be in poor and indigent circumstances...”⁷⁷³ The

⁷⁷⁰ Or at least not directly: as I have noted, the question of whether a property owner was resident or non-resident had implications for statute labour and its commutation.

⁷⁷¹ Augusta By-laws, #5 (1850); FoLL By-laws, #313 (no date).

⁷⁷² FoLL minutes, 11 December 1865.

⁷⁷³ Augusta By-laws, By-law #5, s.12 (1850). The by-law provided that this exemption was only available to those whose property was assessed at less than £25, the exemption level for general taxes. It also provided for an informer’s award of half the fine if one was imposed.

ratepayer was to apply first to a councillor, who was to make due enquiry, which may partly explain the high degree of success at the council level. The Rear of Leeds and Landsdowne's practice of exempting statute labour for such reasons seems to have died out after 1861, possibly because poor relief was specifically included as part of the township's jurisdiction in 1858, and councillors were then able to assist the poor both legally and directly.⁷⁷⁴

Failure to perform statute labour (without an excuse ratified by a councillor and then full council) does seem to have been regularly prosecuted by all three jurisdictions, but all three also seem to have allowed plenty of latitude. Each allowed variation of statute labour requirements practically on request, permitting the ratepayer to work on roads on or near his or her own property as a matter of course. While in some cases the privilege was granted subject to the supervision of the local overseer, in only one case was an application to vary statute labour requirements denied. Even in this case, the request was originally granted, but rescinded, perhaps in retaliation for a claim for restitution by a kinsman of the applicant that was considered extortionate.⁷⁷⁵ In many of these cases the indigence or ill-health of the applicant was cited as ground for the adjustment; perhaps the Assessment Act's provision for discretion in such cases in property tax matters was seen as an implicit sanction. In several, the existence of a large brood of young children (who presumably could not be expected to spell off their fathers on the road, or on the farm while the road work was being conducted), which was established as a ground for relief by the by-laws mentioned above, or the death of the ratepayer (which is nowhere given as a

⁷⁷⁴ *An Act respecting the Municipal Institutions of Upper Canada*, 22 Vic. c.90 (assented to 16 August 1858, effective date December 1, 1858), s.269. But see also 16 Vic. c.181 (1852), s.9 (2).

⁷⁷⁵ In 1876, Lawrence Boyle made a claim for \$150 against the Front of Leeds and Landsdowne for damages to his horse due to "a bridge or culvert." The council settled for \$100. The same day this was agreed to, a resolution allowing John Boyle and John Featherston (who may have been collateral damage in this dispute) to do their statute labour on a road of their choice was then rescinded. A month later the council had to pay a third party \$20 for having boarded the horse; that day a claim by Patrick Boyle for expropriation of land for a road, it was resolved would "be not entertained as the same is an old established road." FoLL minutes, 6 February, 20 March, 2 April 1876.

statutory reason for non-performance) were accepted as extenuating circumstances. Again, these were not ‘legal’ but were accepted as legitimate by the council, and their inclusion in the minutes suggests that it was presumed that they would be by their constituency.⁷⁷⁶

The Rear of Leeds and Landsdowne was creative with statute labour exemptions in the early part of the period in a different way, choosing to exempt ratepayers from statute labour on the grounds of indigence. Again, it is not clear that such exemptions were allowable by statute, except insofar as the requirement is considered a tax for the purposes of the section allowing remittances for ill-health, poverty and gross and obvious error previously referred to. In any event, a few years after direct poor relief was explicitly included as a head of jurisdiction, this method, which was not employed by either of the other townships examined, fell into disuse. At least as far as can be determined: in many cases the councils merely noted that a remittance was granted or reduction made, without recording the reason.

An initial willingness by the Front of Leeds and Landsdowne to experiment with statute labour as a budgetary tool—excusing a contractor and petitioners from completion of their statute labour as part of the contract price for a bridge in the first instance and in lieu of support for a sidewalk in the second—is not to be found in the other jurisdictions, and did not persist in the Front of Leeds and Landsdowne past the second instance, when it may or may not have been accepted.⁷⁷⁷ Possibly trading credit for future statute labour was frowned on as legally dubious, perhaps such arrangements were too difficult to keep track of, given that assessment rolls were filled in from scratch every year, or politically assailable if they purported to last (as was the case with the bridge contract) past the one-year mandate of council. In the latter part of the period,

⁷⁷⁶ Township minutes were occasionally printed in local newspapers. Though I have not found any published minutes for the Front or Rear of Leeds and Landsdowne, I have found Augusta township minutes printed (though not consistently) by the *Brockville Recorder* (also known as *Brockville Weekly Recorder*), AO, N 144.

⁷⁷⁷ FoLL minutes, 20 September and 29 December 1851, 8 October 1856.

exemptions from all taxes for commercial establishments were specifically allowed by statute; the Front of Leeds and Landsdowne was the only one of the jurisdictions to take advantage of this during this period, when its council exempted a steam-mill from all tax for five years.

If a tax was ‘uncollectable,’ it might be struck from the collectors’ roll, usually without setting out the reason for the uncollectability. The minutes of all three councils show many instances of attempts to collect taxes. When considering one request for a remittance, the councillors of the Front of Leeds and Landsdowne were careful to add the caveat that their largesse was dependent on the collector relieving the township of liability for any legal damages which might have been incurred by attempts at distraint.⁷⁷⁸

Since the county requisition was based on the assessment total, not the amount collected, the cost of the remittance to the township could be greater than the stated amount. Even when an uncollected tax bill had been reported to the County Treasurer, to be tracked for eventual sale of the property by the sheriff, the three township councils often retroactively forgave the debt. They also routinely extended the time for payment. Often no reason is given for the forgiveness for these debts, or the interest on the debt.⁷⁷⁹ It is possible that the councillors did not wish to embarrass the objects of their generosity in these cases, but the many occasions on which they did cite a reason for forgiveness for indigence, fire-loss, and ill-health are evidence that being an object of compassion in tax matters was perhaps not considered a matter for shame.

Requests for exemption or reduction for reasons of indigence made to council were as successful as those made to the courts of revision. As far as can be ascertained, none was

⁷⁷⁸ RoLL minutes, 17 January 1876: resolved that “James Kelsey be remitted his taxes for the year 1875, provided the Collector relieves this Township of any liability for cost incurred in distraining and keeping Kelsey's property while striving to collect said Kelsey's taxes.”

⁷⁷⁹ RoLL minutes, 9 February 1869. Forgiveness on interest on back taxes of former councillor (and former assessor) Thomas Sheffield and two others (the amount forgiven was less in the case of Sheffield's debt).

refused, nor were any held over for investigation. Many were made by petition, but some by motion of a councillor. That “it was represented” that a ratepayer was unable to pay was deemed a sufficient ground for relief. Augusta Township granted tax exemptions for inability to pay in batches, in keeping with its practice of group grants of poor relief. The motions in these cases referred matter-of-factly to the “poverty and sickness [the listed ratepayers] have had to pass through in the last year.”⁷⁸⁰ There did not seem to be any sense that the poor or those in difficult circumstances should have to divest themselves of their capital to the threshold of the personal exemption in order to request tax relief, or indeed to request poor relief. Some overlap can be seen, but many—especially widows—received tax relief who were not also receiving poor relief.

Conclusion

Despite the opacity of and lack of detail provided by the record, it is safe to say that the townships of Augusta and the Rear and Front of Leeds and Landsdowne during the thirty years following the implementation of the Baldwin Act in Canada West/Ontario were not particularly “legalistic” in their implementation of the tax laws, whether acting as courts of revision or in their capacity as quasi-administrative tribunals. Though cognizant of and ready to follow the spirit of the laws, they also seemed disposed to consider these as non-binding as far as council action was concerned. Even when following the law exactly, for instance, in the matter of clergy exemptions, they chose to appeal to ‘custom’ to legitimate their actions. The records of their decisions never cited the by-law or law involved; where they bothered to give any reason at all they chose to stress the grounds of their decisions in policy or natural justice.

⁷⁸⁰ Augusta minutes, 11 March 1879.

On tax matters, as on most other subjects, the councillors showed a remarkable consensus.⁷⁸¹ That this was not a distortion, a function of the record keeping process, is demonstrated by the recording of occasional disagreements on other matters, especially involving patronage, and evidence of amendment of the record where the clerk expected a motion to be passed and had to insert amendments and record ayes and nays. Moreover, their attitudes did not seem to change with turnover in personnel. Albeit to different degrees, all three townships demonstrated a somewhat nonchalant attitude to the statutory minutiae of dates and deadlines, and the distinction between court of revision business and that of council.

One can understand the reasoning: if municipal revenue was theirs to spend as they wished, or at least as not specifically prohibited, the right to forego its collection would seem to follow logically, whatever the legislative drafters might have directed otherwise. The identical membership, meeting place and clerk for townships councils and courts of revision may have accentuated a natural tendency to deal with tax appeals in the same way, and according to the same standards as other claims and issues. It is thus hardly surprising that there are instances of political or personal bias in abundance, and it is of course possible that these may have been even more pronounced than the record indicates. Social filters may have operated to obscure relations of political power and cultural tyranny, so that only those claims which were understood to be acceptable even made it to the court of revision or to council.

⁷⁸¹ In the seventies especially, there were disagreements not only as to whom the council hired, but how much was paid. Applicants tendered for the position much as they would a contract. For example, in 1875, J.A. Bradley, long-time clerk of the Front of Leeds and Landsdowne, refused to accept less than the \$225.00 per annum that he was to that point being paid, and resigned. Council then decided to accept the application of John Redmond (formerly an assessor) at \$150.00, but then had second thoughts that “the appointment of a new clerk would not be for the interest of this municipality considering the amount of work to be done and the important documents and contracts to be entered....and as the present Clerk has performed a large portion of the work of the present year it would be no saving to this municipality to appoint a new clerk.” FoLL minutes, 22 February 1875. However, the next year Bradley retreated from this position and accepted \$175.00. By 1878 this had been reduced to \$150.00: FoLL minutes, 7 February 1876, 18 February 1878.

Certainly, it seems likely that councillor-revisors shared, or reflected, the expectations of their constituents, propertied by definition, whose petitions dictated the greater part of the agendas of their meetings. It is clear that in following or departing from the law, the lesser elites who made up the township council did not feel compelled by their voting public to place a premium on the maximization of revenue. Not that they neglected their duty to raise funds.⁷⁸² Nevertheless, the mid-Victorian councillors of Augusta and Leeds and Landsdowne, Front and Rear, did not act as predatory administrators. The assessment laws, and the public priorities they are alleged to have embodied—the encouragement of improvements in infrastructure, and indirectly the economic progress which local taxes made possible, were not inconsequential. Since the preponderance of their time and money was spent on roads and schools, it cannot be said that the councils, and indirectly the ratepaying constituents, failed to share these particular provincial priorities. However, when law and provincial policy came into conflict with local community norms such as mercy and justice, the former were consistently trumped by the latter.

It is impossible to tell how far these findings pertain generally to municipal governments in Canada West/Ontario. But since the introduction of the township as the default for local government with right to tax and manage money was such a major departure from the pre-Baldwin Act system of local governance, since the majority of the Canada West/Ontario settler society were residents of townships, and since local taxation was the only direct tax to which they were subject, these observations should be taken seriously in any evaluation of local autonomy at this time. For these three townships, municipal law facilitated, or at least permitted, a sphere of autonomy in a key aspect of local governance.

⁷⁸² Indeed, the ability of Canada West to do so, in comparison with Canada East, was a notorious challenge to the union, and the later dominion. See Smith, *Toryism, Classical Liberalism, and Capitalism*, 1-25. J. L. Little writes of the reluctance of Quebecers to pay municipal taxes: Little, *State and Society in Transition*, 320.

Chapter 8: The Legislative Agency of Local Governments: Petitions from Municipal Corporations to the Legislative Assembly of Ontario, 1867-1877

Now used almost exclusively as a tool of collective advocacy, petitions in the common law world were once merely the common format for individual supplication to the crown or government. The transition from private to public was already clear in the nineteenth century, when petitions, circulated and delivered by increasingly reliable and inexpensive postal services, became such a popular vehicle for reform-minded agitators that ‘gag-rules’ were enacted by some legislatures to curb their use.⁷⁸³ In mid-Victorian Ontario, some twenty-five years after the advent of “responsible” government whereby elected representatives might have been expected to absorb the role of petitions, and also in spite of a gag-rule, petitions were a commonly employed element of the legislative process.⁷⁸⁴ Individuals and corporations still used them for private benefit. Others hoped to influence policy, particularly on “wild card” issues, and local governments routinely used them for both purposes.

⁷⁸³ For gag rules in the United States, see David C. Frederick, “John Quincy Adams, Slavery, and the Disappearance of the Right of Petition,” *Law & History Review* 9, no. 1 (1991): 113-55. Frederick’s discussion focuses on the political and constitutional aspects of petitioning, and it is unclear whether the disappearance also refers to other forms of petitioning. In the case of Britain, however, Colin Leys discovered that neither similar restrictions, imposed for comparable reasons, nor, as he expected, the passage of the Reform Bill, served to stop petitions; he attributed the lag between constitutional developments and eventual attenuation of petitioning in large part to social inertia: Colin Leys, “Petitioning in the Nineteenth and Twentieth Centuries” *Political Studies* 3, no. 1 (1955): 45-64.

⁷⁸⁴ Historians’ interest in petitions, formerly confined to the petition of right and related constitutional subjects, has extended to a wide variety of social and political topics. See Kristin A. Collins, “‘Petitions Without Number’: Widows’ Petitions and the Early Nineteenth-Century Origins of Public Marriage-Based Entitlements,” *Law & History Review* 31, no. 1 (2013): 1-60; J. K. Johnson, *In Duty Bound: Men, Women, and the State in Upper Canada, 1783-1841* (Montreal: McGill-Queen’s University Press, 2014); Henry Miller, “Popular Petitioning and the Corn Laws, 1833-46,” *English Historical Review* 127, no. 527 (2012): 882-919; Steven Watt, “‘Duty Bound and Ever Praying’: Collective Petitioning to Governors and Legislatures Selected Regions of Lower Canada and Maine, 1820-1838” (Ph.D. diss., Université du Québec à Montréal, 2006); James G. Hanley, “The Public’s Reaction to Public Health: Petitions Submitted to Parliament, 1847-1848,” *Social History of Medicine* 15, no. 3 (2002): 393-411; Kathy Strunk and Karon LeCompte, “Tennessee’s First Public School Finance Issues: the Peoples’ Petitions, 1812-1861,” *American Educational History Journal* 31, no. 1 (2004): 29-36; Maggie McKinley, “Petitioning and the Making of the Administrative State,” University of Pennsylvania Law School, Public Law Research Paper No. 18-9 (2018), SSRN: <https://ssrn.com/abstract=3150671>; and the collection of essays in *Petitions in Social History*, ed. Lex Heerma Van Voss (Cambridge: Cambridge University Press, 2002).

In an early article on the subject, political scientist Colin Leys focussed on the “mass” public petitions made possible by printing technology in nineteenth century Britain.⁷⁸⁵ Surprised by the preponderance of public over private petitions, Leys suggested that it took the public time after the reform of Parliament to realize that their petitions were being ignored. Because this insufficiently explains why the phenomenon continued well into the twentieth century, he ventured as a corollary that “the successful organization of petitions was an important end in itself.”⁷⁸⁶ Whether or not the latter point was true of petitioning citizens in Ontario, it is unhelpful with regard to what can be termed “institutional” petitioners.⁷⁸⁷ To the school boards, Boards of Trade, and municipal corporations who regularly petitioned the provincial (and also the federal and imperial) legislatures, organization was a *fait accompli*, so presumably not a concern. Although municipal councillors occasionally circulated draft petitions to other local governments to enlist support, it is more likely that in most instances these groups intended to do what they were purporting to do, that is, change their legal environment in specific ways.⁷⁸⁸

The use of petitions to redress grievances by requesting alterations in law dates in Upper Canada to the appearance of an organized government.⁷⁸⁹ Unfortunately, petitions and governmental records in general for the pre-confederation part of the period under investigation, held at the National Archives in Ottawa, are sporadic at best. The Archives of Ontario, on the

⁷⁸⁵ Leys, “Petitioning in the Nineteenth and Twentieth Centuries.” For considerations of the role of petitioning in nineteenth century reform politics see Seymour Drescher, “History’s Engines: British Mobilization in the Age of Revolution,” *William & Mary Quarterly* 66, no. 4 (2009): 737-56; Miller, “Popular Petitioning and the Corn Laws.”

⁷⁸⁶ Leys, “Petitioning in the Nineteenth and Twentieth Centuries,” 58.

⁷⁸⁷ The practice of institutional or corporate petitioning seems not to have been addressed directly by academics.

⁷⁸⁸ See a similar phenomenon discussed by Daniel Carpenter, “On the Emergence of the Administrative Petition: Innovations in Nineteenth-Century Indigenous North America,” in *Administrative Law from the Inside Out: Essays on Themes in the Work of Jerry L. Mashaw*, ed. Nicholas R. Parrillo (Cambridge: Cambridge University Press, 2017), 349-72

⁷⁸⁹ For petitions and the legislative process at the federal level, see John George Bourinot, *Parliamentary Procedure and Practice, with an Introductory Account of the Origin and Growth of Parliamentary Institutions in the Dominion of Canada* (Montreal, 1884). Sheila Lambert in *Bills and Acts: Legislative Procedure in Eighteenth-Century England* (London, 1971) examines the private bill procedure in England in some depth, though for a slightly earlier period.

other hand, has a dedicated collection dating from confederation, from which it appears that few are missing.⁷⁹⁰ I have based this chapter on the records from the ten year period 1867-77; nothing in the provincial or federal records, or indeed those of the municipalities held by the provincial archives, suggests that this period is unrepresentative. Petitions, drafts, and related correspondence can also be found in the records of various municipalities held by the Archives of Ontario. The municipal records, published acts, the *Journals of the Legislative Assembly*, the rules of the legislature and sessional papers, the petition wrappers and included affidavits and notices, and indices and registers, although less complete than the petitions themselves, provide much useful information.

Although Sidney and Beatrice Webb's multi-volume history of English local government, which seems to leave no stone unturned at least twice, does not refer to municipal petitioning in England, a volume is devoted to the local acts by which nineteenth-century urban reform was often accomplished.⁷⁹¹ As I discuss in Chapter 1, American urban historian Jon C. Teaforde has argued that such private or "special" legislation was one fount of municipal autonomy in the United States from 1865 to 1900, but in arguing that Ontario municipalities were autonomous in the post-Baldwin Act period, Canadian urban historian John H. Taylor does not contemplate this possibility.⁷⁹² If Ontario local governments could command private legislation as their urban American counterparts did, or indeed public legislation on municipal issues, Taylor's general thesis concerning municipal autonomy vis à vis the province would be strengthened. As the formal and common method of communication and request to government,

⁷⁹⁰ Petitions to the Legislative Assembly of Ontario, 1867-1933, 1987-2011, AO, RG 49-38-2. I have cited these by sessional year and number.

⁷⁹¹ Webb and Webb, *History of English Local Government*, vol. 5, *Statutory Authorities for Public Purposes*.

⁷⁹² Taylor, "Urban Autonomy in Canada," 478-500; Teaforde, "Special Legislation and the Cities." Except where the text makes clear, I do not distinguish between urban and rural governments. As far as I can tell they were not treated differently within the petitioning process.

petitions offer the best evidence of what municipal councils considered to be necessary and desirable, or inadequate and harmful, in the law that gave them existence and within which they operated.⁷⁹³

In their survey of literature on legislative history, Margaret Susan Thompson and Joel Sibley imply that research into bills and acts “before and off the floor,” should be supplemental and secondary to the preliminary and primary work of “counting.”⁷⁹⁴ I have followed their recommendation, but only to the most rudimentary level of classification and analysis. A quantitative model designed to track the relative success rate of petitions from municipal corporations would be superficially attractive but ultimately unproductive, due to the fluidity of the texts (many of which combine or alternate requests), the indeterminacy and complexity of the petitioning and legislative processes, lacunae in the legislative records, lack of useful Hansard and committee records, and conflict among the petitioning municipalities themselves. The examination that follows is subject to the inherent weaknesses of qualitative inquiry, but ultimately power and independence are subjective subjects.

Petitions from Municipal Corporations

In the first ten years after confederation, 6927 petitions were filed with the clerk of the Ontario Legislative Assembly, of which 1536 (22 percent) were from municipalities. Much can be learned about these even without opening them. The petitions were folded in thirds so that information could be inscribed on the backs. Each petition was given a number, under which it

⁷⁹³ Of course, there may well have been ‘back channel’ informal communications. But these would have been formalized by petition before a bill was moved, unless they were to be truly secret. It is hard to imagine many instances when the municipality would want its request to be presented as though it was an initiative of government, and the government would have been agreeable to such a manoeuvre.

⁷⁹⁴ Margaret Susan Thompson and Joel H. Silbey, “Historical Research on Nineteenth-Century Legislatures,” in *Handbook of Legislative Research*, ed. Gerhard Lowenberg et al. (Cambridge, Mass. and London, England: Harvard University Press, 1985), 701-32, 710.

was filed and also registered in the petition register and distribution books. The number was inscribed at the bottom by the clerk, along with the date of filing and the name of the member who filed it. At the top the clerk inscribed the petitioner's name(s) or description (e.g. "certain inhabitants of the township of York," "The Municipal Corporation of the Township of York") along with the relief sought.⁷⁹⁵ In some cases the registrar made amendments to suit his indexing preferences. Printed blank-form petitions from the end of the period studied also had a printed back for greater clerical convenience. The few petitions in every year that are missing can be identified by subject and petitioner in the petition registers.⁷⁹⁶ Petition "wrappers," envelopes that seem to have been provided by the legislature, are filed in a separate series.⁷⁹⁷ In some cases they can be matched against the corresponding petition by means of the number, but many more of the wrappers are missing. The wrappers are also less uniform in the information they present. While spaces were provided to note various matters about the petition and resulting bill, if any, on most some or all of these are left blank. Some wrappers contain affidavits swearing to the conditions precedent or press clippings of required notices (occasionally these find their way into petitions as well).⁷⁹⁸

Municipal councils were responsible for more petitions than any other identifiable group. This is the more remarkable when it is noted that the greater number of the filed petitions are printed standard forms, of which hundreds might be filed on a single issue. Municipal governments participated in some of these mass petitioning efforts, and indeed were responsible for the bulk of petitions on two issues, namely the establishment of an ophthalmic hospital and

⁷⁹⁵ The wrapper summary is not always a reliable guide to the relief sought in the petition.

⁷⁹⁶ Petition Register books, AO, RG 49-38-3.

⁷⁹⁷ Petition wrappers, AO, RG 49-38-1.

⁷⁹⁸ There seem to be no extant records of the Private Bills Committee for this time period, and references to petitions and their outcome in the Journals of the Legislative Assembly although plentiful are inadequate and inconsistent: Canada. Legislature. Legislative Assembly, *Journals of the Legislative Assembly of Canada*.

repeal of tax exemptions. In general, however, they confined themselves to traditional, non-standardized, hand-written “prayers for relief.”⁷⁹⁹ As might be expected, much of the petitioning of municipal councils is concerned with amendments to the municipal and related acts, but many other areas of law and policy, such as conservation policy, franchise acts and medical acts, were considered by municipal councillors to be fit subjects for petitioning.

The petitions, like the ensuing bills and acts, if any, were classified by the clerk as “public” or “private” according to parliamentary law and convention. However, this classification was not always cut and dried. Some petitions are ambiguous and others combine requests on several issues, occasionally mixing public with private. Of the 1536 from municipalities, 576 were filed as private and 960 as public.⁸⁰⁰ Each type was (and is) subject to a separate procedure and status before and after enactment. The terms are somewhat confusing, owing to the fact they refer to the legal character of the law to be altered, not to the scope or impact of the change. Thus, for example, while a petition to regulate railways or a particular class of railways would be classified as “public,” a petition to incorporate a major railway with far-reaching economic, social, and political repercussions would still be “private.”⁸⁰¹ Nor should one mistake the private petition/bill/act for the private member’s bill, which can be either public or private in legislative status, as can government-sponsored legislation.

⁷⁹⁹ Some of these were concerned with monetary relief or aid-in-kind, and are marked (presumably by the clerk) “not read” or “praying for aid,” as any petition requiring the outlay of public money required prior approval of cabinet, with a duplicate petition sent to the Lieutenant Governor. Because these petitions for aid cannot be classified as attempts at legislative change, they therefore will be considered only incidentally, to illustrate various attitudes of municipal politicians: Ontario Legislative Assembly, *Rules, Orders and Forms of Proceeding of the Legislative Assembly of Ontario, adapted by the House in the First Session of the First Parliament* (Toronto, 1868), 23 (2nd edition, 1876), 26 [hereafter cited as *Rules*.] In the first edition, the rule only required that a petition for public aid be adjourned to a later day. An archivist’s or clerk’s note in RG 49-38-2 (1871-72) on the back of a printed notice to provincial members states that such petitions required a duplicate to the Lieutenant Governor; this was confirmed by the second edition.

⁸⁰⁰ The hybrid “local” act, used extensively in England, was never transplanted to Ontario: Lambert, *Bills and Acts*, 53, 85.

⁸⁰¹ Lambert, *Bills and Acts*; see also Sir Frederick Clifford, *A History of Private Bill Legislation*, 2 vols. (London: Butterworths, 1885).

I have broken down the public petitions from local governments during this ten year period by general subject, from the most to least numerous, as follows: ophthalmic hospital (228), assessment act (189), municipal institutions and municipal drainage acts (115), liquor licensing/prohibition (115), education (48), registry act (30), local improvement fund (29), distribution of supplies (17), distribution of statutes (13), conservation/timber policy (11), elections/franchise/voters list act (10), medical act (9), Canada thistle act (4), vagrancy act (2), miscellaneous (10). Private petitions from local governments categorized by subject, from the most to the least numerous, are as follows: railways (134), restructuring jurisdictions (118), aid for civic projects or general purposes (44), “legalize” by-law or agreement (28), confirm or deny, survey etc. roads (24), authorize/amend water or gas works (18), location of registry office (14), charitable institutions/aid to fire victims (12), bonus to manufacturers (12), change of municipal classification (10), Huron and Ontario canal (9), open/close/widen/change name of streets (9), companies other than railways (9), limit or extend limits of municipality (9), additional provincial member of legislature for Essex (8), normal schools (8), authorization of extra debt (8), amendment of debt (8), distribution of Middlesex debt (7), investigation of various matters (5), crown lands in municipality (6), accounting between municipalities (4), legalize past mistakes (3), miscellaneous (19).⁸⁰²

The Petitioning Process

During the last several decades of the eighteenth and early decades of the nineteenth century, British radicals made use of petitions to stonewall Parliament, resulting in the adoption of the so-

⁸⁰² Some of these would not have been meant to result in private acts, but to changes in schedules to public acts, but are included here because they would have been routed through the private bills committee. Since they were not designed to change the law, I have not included in the tally petitions for monetary aid that would not result in legislative change.

called “gag rule,” replicated in Ontario, whereby a member could not speak on presentation of a petition, but was confined to reading it. Unless it concerned an urgent, pressing, personal matter, there was to be no debate.⁸⁰³ Members were under a duty to present all petitions from constituents, but were not responsible for advancing their contents. It was thus customary for politicians to present, though not necessarily to promote, petitions on opposing sides of an issue.

By definition, private acts confer a privilege. Hence the prerequisite petitions for such acts were subject to a quasi-judicial process intended to prove they were also in the public interest and to allow anyone who might be adversely affected to object. Private petitions were to be referred first to the committee on standing orders; if correct in form, they then proceeded to the Private Bills Committee.⁸⁰⁴ There were restrictions on the time during the session in which a private petition could be brought and the ensuing bill enacted; these grew more stringent over time, although the time a private petition spent in committee was halved. Strict notice requirements had to be met and demonstrated. The grounds for the prayed-for relief, set out in the preamble, had also to be proved, although occasionally the House would send back a bill rejected by the committee with the curt instruction to consider the preamble proven.⁸⁰⁵ Aside from this latter phenomenon, it is hard to tell how far partisan politics intruded into the private bill procedure. The *Journals of the Legislative Assembly* indicate that few private bills were subject of a division in the House as it sat as a committee of the whole or even of discussion.⁸⁰⁶

Private legislation was not cheap. As well as the costs of drafting the bill, usually by the petitioner’s own lawyer or parliamentary agent, and printing the bill in the number required by

⁸⁰³ Leys, “Petitioning in the Nineteenth and Twentieth Centuries,” 48-52.

⁸⁰⁴ *Rules* (1868), (1876).

⁸⁰⁵ See Arthur Sydere, *General Index to the Journals and Sessional Papers of the Legislative Assembly of the Province of Ontario, 1867-1882* (Toronto: Warwick & Sons 1883). Occasionally other requirements, such as time for filing, were waived by the committee.

⁸⁰⁶ Unfortunately, the *Journals* are less than uniform in their reporting regarding petitions.

the rules (one per member unless otherwise specified), done by the government's contractor, there were fees payable to the Legislature (sixty dollars in 1867, one hundred dollars by 1877).⁸⁰⁷ Under some circumstances these fees would be remitted, for instance if the petition/bill were withdrawn at an early stage. Very rarely, it seems, were fees remitted if the bill passed. In addition, a private petitioner might incur the expense of counsel and any witnesses. Notices in the local papers and the *Ontario Gazette* would have to be paid for and, if documentation were required, there would be other costs. For example, a municipality that wished to separate from another or change its category of incorporation (for example, from village to town) would incur costs of notices, procuring copies of assessments, polls and an accounting.⁸⁰⁸ "Lobbying" connotes personal contact—in the lobby—between the lobbyist and member, and private petitions were probably often accompanied by a petitioner or representative; but attendance, though likely helpful, was not a condition prescribed by the rules.⁸⁰⁹ "Public" petitions faced fewer technical obstacles. They could be brought at any time and cost nothing, unless there was a cost for drafting; in the case of municipal corporations, this usually seems to have been done in-house by the clerk.⁸¹⁰ If a petition attempted to alter policy, it could also be vulnerable to partisan political challenges, but the petitioner would have little if anything to lose by the effort.

⁸⁰⁷ *Rules* (1868), 15, and *Rules* (1876), 17, 30.

⁸⁰⁸ That the petitioning municipality would bear these costs was set out in the statute itself. See, for examples, 39 Vic. c.39, c. 40, c. 41, and c. 42.

⁸⁰⁹ For the origins of lobbying, see Hurst, *The Growth of American Law*, 62. Elwood Jones and Douglas McCalla mention the advantage of physical proximity to the private bills committee: "Toronto Waterworks 1840-77: Continuity and Change in Nineteenth Century Toronto Politics," *Canadian Historical Review* 60 (1979): 300-23, 309.

⁸¹⁰ This was the practice in Leeds and Grenville counties, and an examination of the handwriting against the signature of the clerk (who was a signing officer of the municipal corporation, and that of the Warden/Mayor/Reeve indicates that this was also the case in other municipalities. Since clerks were generally salaried employees any cost would be indirect and negligible. A few (non-municipal) petitions include the name of the lawyer or law firm on the back. Others can be recognized as "professional" by the quality of the paper, calligraphy, and language. The rules provided for parliamentary agents; there was a professional "parliamentary bar" in England; *Private Bill Legislation* 2:267-70; Lambert, *Bills and Acts*; *Rules* (1868), 19.

Consequently, it is not surprising that municipal corporations' public petitions outnumbered their private petitions during these years.

Perhaps the most telling difference between the mass petitions and those generated by municipal corporations and other institutions is their style. The printed, standard-form, mass petitions are typically long and rhetorical, waxing eloquent on the liberty of the British subject or the evils of drink. This is in keeping with Leys' observation that they are designed more for their effect on the petitioners than on the petitioned; that is, the main aim is to induce the reader to sign, thereby committing him- or herself to the cause.⁸¹¹ Municipal petitions that were not part of a mass petitioning movement were rarely printed during this period, except when they were circulated to other local governments for consideration and support. Sometimes municipal petitions on the same issue used the same wording, but in most cases municipal councils were stubbornly independent. There are numerous examples in the Essex and the Leeds and Grenville council papers of amendments, emendations, complete revisions, and refusals to join in the petitioning efforts of other local governments.⁸¹²

This is not to intimate that municipal petitions were carelessly drafted or that no thought was given to their reception. Some municipal corporations petitioned more frequently than others, and some were not heard from at all, but for few it seems was petitioning a thoughtless, rote exercise. Many gave grounds for the reform promoted. Many ask for a measure of relief in the alternative or that some objectionable clause be made permissive rather than replaced outright. References to municipalities' experience in carrying out the law—evidently their strongest claim to legitimacy—are common. Drafts of petitions in the Essex and the Leeds and

⁸¹¹ Leys, "Petitioning in the Nineteenth and Twentieth Centuries," 58.

⁸¹² AO, Essex County Council Fonds, F 1654, documents cited by county name, year, and folder number; United Counties of Leeds and Grenville Fonds.

Grenville council papers show alterations in wording, presumably to make the petition more effective. For example, one petition requesting the adoption of an American-style debtor-protection law shows the word “Canada” crossed out and replaced by “Her Majesty’s Dominions,” perhaps to counter an anticipated inference of disloyalty.⁸¹³ Others tried sycophancy, suggesting that better provisions must have been inadvertently overlooked.⁸¹⁴ Of course, some councils were in fact more ingenuous than disingenuous. One local government petitioned for monetary assistance, giving as its sole explanation the argument that progress and improvements are expensive.⁸¹⁵ Some petitions cite statutes quite professionally, only to refer to the wrong section; one is seriously misspelled (in spite of having been transcribed by a professional clerk); others ask for action that could not be more clearly *ultra vires* the province.⁸¹⁶

However, the unsophisticated petitions are decidedly the minority. Most demonstrate the sober second thought that the province may have given up in dispensing with a legislative council. They point out contradictions and drafting errors and anticipate problems of implementation. One such petition refers to a discussion of a proposed provincial bill by a committee of the municipal council. The committee report is appended; it goes on for three and a half pages and contains thirty-two suggestions, mostly to correct errors of drafting.⁸¹⁷ Although not all technical and practical ideas of local governments were acted on by the province, in many cases the legislature was probably more than pleased to buttress their free-lance drafting talent

⁸¹³ Essex county council papers, 1869 (3).

⁸¹⁴ This phenomenon was especially prevalent in the petitions on the issue of “equalization.” See, for example, 1869 (78) and 1870-71 (27).

⁸¹⁵ 1869 (755).

⁸¹⁶ See, for example, 1871-72 (388), 1876-77 (1367), 1871-72 (102). Of course, confederation was still a recent event and it might well be that the new division of powers was apt to slip the mind.

⁸¹⁷ 1871-72 (105).

with the eagle eyes of municipal politicians.⁸¹⁸ Not to mention those of the local governments' civil servants—the correspondence of the united counties of Leeds and Grenville indicates that many of the practical problems that the council eventually brought to the legislature's attention had been originally pointed out by their clerk or treasurer. As has been remarked of the much-maligned lobbyists of the American Gilded Age, the councillors and their staff simply knew more about their interests and could not but be influential as a result.⁸¹⁹ For their part, municipal governments and their employees seem to have been very aware of the legislative agenda. Petitions refer to proposed bills, bills presently before the House, the “usual Notices,” and even bills presented in a “hurried manner” before the municipality could act.⁸²⁰ Most petitions seem to have been forwarded by mail, and a short time might lapse between the resolution of a council on an issue and the presenting of the petition to the legislature.⁸²¹

Generally business-like and to the point, municipal petitions still resonate with the code-words of their framers' time and place. It was not necessary to indulge in the purple prose found in the printed mass petitions to convey a sense of the values shared by the petitioners and their audience. As one might expect, municipal petitions advert to a shared belief in liberty, progress, development, and Christianity, as well as lesser virtues of convenience, efficiency, economy, and necessity. Interestingly, the value appealed to most often is justice; “arbitrary” was the dirtiest word in the municipal politician's lexicon. To state that a particular state of affairs or legal process was unjust was often all that municipal politicians seem to have felt obliged to say in asking for legislative action, whether the matter was “public” or “private.”

⁸¹⁸ 1876-77 (1029), 40 Vic. c.17 s.40.

⁸¹⁹ A phenomenon now known as ‘capture,’ but not a new one: Thompson and Sibley, “Historical Research,” 713.

⁸²⁰ See, for example, 1868-69 (785).

⁸²¹ For example, 1869 (883), 1868-69 (783, 797), 1868-69 (896), 1875 (59).

Aside from formal protestations of humility, the tone of municipal petitions is rarely deferential and often blunt. Some local governments “recommend” various changes in the law, giving no reasons; presumably they felt the weight of their stated opinions was sufficient. One local government saw fit to lecture the assembly in an almost condescending manner: “The abolition of the said [local improvement] fund [is] at variance with the well understood principle of British Legislation [of] which we look on you as the guardians, and to which we believe it to be your desire ever to define; namely the respect for the vested rights of the subject.”⁸²²

We can surmise that other segments of the community considered that municipal councils had influence with the legislature from their use of the councils as launching pads for their own lobbying efforts. The council papers of the County of Essex, for instance, contain submissions from residents to be forwarded to the legislature under the aegis of the county council. Most municipal petitions filed with the legislature on the subject of railways are of this type. Some petitions explicitly state that the council is acting as the agent for others. The series of petitions concerning the de-legalization of midwifery by the Ontario Medical Act, for instance, almost all state that “application has been made to the council” on the question.⁸²³

No doubt the imprimatur of an elected group was considered to add legitimacy, especially in the case of commercial ventures. Clearly, the local member of the provincial parliament was not the only avenue of representation to the legislature recognized by contemporaries. However, the petitions in themselves provide insufficient evidence to determine whether councils were lobbied in lieu of or in addition to the member or regional power broker.⁸²⁴ This is not to suggest

⁸²² 1869 (724).

⁸²³ 1876-77 (89), for example. The Ontario Medical Act petitions, though hand written, all use the same or similar wording; see C. David Naylor, “Rural Protest and Medical Professionalism in Turn of the Century Ontario,” *Journal of Canadian Studies* 21 (1986): 511-37.

⁸²⁴ Lillian F. Gates, *After the Rebellion: The Later Years of William Lyon Mackenzie* (Toronto, 1988), 180 ff., demonstrates that Mackenzie, while provincial member for Haldimand County, worked in conjunction with the county council; this is only one instance and for a slightly earlier period. It seems likely that tandem efforts would

that municipal councils were in any way disinterested parties in acting as clearing houses for the supplications of others, especially in the case of railways, an interest that has been well documented.⁸²⁵ As far as other matters are concerned, it would seem that municipal councillors were moved to petition by a perceived benefit or loss to their constituency. There is no evidence that one could require the council to submit a petition to the legislature as of right, as one could the local provincial member.

Petitions for Private Acts

It is easier to establish that municipal politicians thought they had influence in obtaining private acts, and that they had support for this belief among other sectors of the population, than that the belief was well founded. Correlation of private petitions with the statute books reveals considerable success, which a perusal of the *Journals of the Legislative Assembly* indicates was also true of other private bill petitions, especially those involving commercial corporations such as railways. We cannot, however, conclude that this success was automatic or easy to come by, or that it is indicative of power or influence.

Many private petitions to “legalize” by-laws not allowed by statute—say, for the raising of debentures in order to loan the proceeds to a railway, or to grant a tax exemption “bonus” to a manufacturer—were routine applications but not mere corrections *ex post facto*. The by-law in question was scrutinized by the private bill committee to ensure that there had been adequate notice and no interests were injuriously affected. If these criteria were met, the bill passed

depend on considerations of party or other power relationships. See also Noel, *Patrons, Clients, Brokers*, especially chapters 12 and 13. Noel contends that party structure at this time was still essentially a coalition of factions and interests.

⁸²⁵ See *inter alia*, Ken Cruikshank, *Close Ties: Railways, Government and the Board of Railway Commissioners, 1851-1933* (Montreal and Kingston: McGill-Queen’s University Press, 1991).

without problems. Other types of private petition as well seem to have been commonly granted as long as they were not opposed. Where a municipal project did meet opposition, the request was occasionally denied. The committee does not seem to have counted noses, whether corporate or individual, in these matters, but no doubt the onus “to prove the preamble” was greater where contradictory allegations were raised.⁸²⁶ This function of the private bills committee, though perhaps more administrative than either legislative or adjudicative, was still far from automatic. In addition to the costs and delay involved in the committee process, success could be prejudiced by the legislative context. For example, a petition might pass all preliminary stages, only to have to be resubmitted if the assembly prorogued before the bill’s third reading. Such delay could be crucial; in their study of the attempts of the City of Toronto to establish waterworks, Douglas McCalla and Elwood Jones report that an extra year made the difference between success and failure of the proposal when the economy suffered a downturn.⁸²⁷

Yet none of these obstacles seems to have aroused any explicit ire from local governments, who seem, on the contrary, to have been glad of any attention they could muster from the legislature. There is no hint of agitation for general enabling legislation or a simplified procedure, repeal of the watch-dog provisions, or attempts to circumvent the process. Ontario did not experience the scandals and ensuing procedural and substantive restrictions on the private bill process which occurred in many of the United States at this time.⁸²⁸ Rather, local governments seem to have preferred to have an unquestionable legislative stamp of approval for their various schemes, however onerous the process. Any doubt as to jurisdiction could reduce the value of municipal debentures, as several petitions candidly admit. Moreover, if a scheme

⁸²⁶ For example, the petition of the City of Toronto to establish gasworks: 1874 (244).

⁸²⁷ Jones and McCalla, “Toronto Waterworks 1849-77,” 300-23.

⁸²⁸ See Hurst, *The Growth of American Law*, 229, 242.

failed, advance approval might forestall legislative retribution in the form of the stringent debt consolidation acts that were the legacy for some local governments of the crash of 1857.⁸²⁹

It was perhaps considered better to make a trip—or several—to the private bills committee than to deal with courts at any level. There appears at least one instance wherein a local government, a party to a matter already before the courts, sought a guaranteed outcome by legislative fiat (possibly facilitated by the fact that the warden was also a provincial member).⁸³⁰ Usually, however, the two legal avenues were not mutually exclusive and often intertwined. The County of York, for example, for years tried to separate from judicial union with Toronto to avoid subsidizing Toronto's busy justice administration. Only days after one such petition, they withdrew from the battle, explaining in a supplementary petition that it was preferable to put up with the situation than invite litigation, presumably on the question of a judicial accounting, by pressing for new legislation.⁸³¹

About seven out of ten of the private petitions from municipal corporations seem to have been successful. In pondering this level of success, it is important to keep in mind that a high rate of success for the instigators of legal proceedings is axiomatic.⁸³² Few will push a losing case, especially if there are significant costs involved. Private bills faced both fixed and variable expenses; in addition, there is evidence that lawyers or parliamentary agents were involved in at

⁸²⁹ The bankruptcies of numerous communities, and the legislative responsibility therefore, have been chronicled by several historians. For a detailed account see Shortt, "Municipal History, 1791-1914," 442-52. It was perhaps due to former laxity in matters of municipal indebtedness that the legislature was careful in the amendment of these acts.

⁸³⁰ The council of the City of Kingston accused the provincial member, also warden of the County of Frontenac, of introducing a colorable, retroactive bill to prejudice the rights of the city in pending litigation with the county in the Court of Common Pleas: 1867-68 (893). In his study *Close Ties*, Ken Cruikshank notes that the County of Simcoe, though armed with favourable legal opinions, preferred to lobby the federal government (albeit fruitlessly) rather than proceed to the Court of Appeal (35).

⁸³¹ 1870-71 (290, 294).

⁸³² This is not always recognized by legal historians. See for example Tony A. Freyer, "Law and the Antebellum Southern Economy: An Interpretation," in *Ambivalent Legacy: A Legal History of the South*, ed. David K. Bodenhamer and James W. Ely (Jackson, Miss., 1984). Aside from the petitions requesting aid, which I have not investigated, about seven out of ten private petitions seem to have been successful.

least some, and probably many, of these private petitions.⁸³³ It being their function to anticipate and avoid obstacles and defeat, professional advice in advance may have been a factor in the composition of submissions. The care in drafting, characteristic of the municipal petitions generally, is especially marked in the private petitions. Reasons and circumstances also tend to be more plentiful in private than in public petitions. Some local governments seem to have assumed that conditions to the relief sought would be imposed and anticipate these in the petition. When asking that power be granted to build a drain or other improvement or detach or attach territory, the petitions would usually stipulate that the power would be exercisable only if it were the desire of the majority of rate-payers or settlers, expressed either by further petition or special poll.

The occasional private petition gives a glimpse of the line of an argument to be taken at the hearing. The village of Clifton (now Niagara Falls) petitioned on several occasions for different types of legal privileges to enhance its ability to attract tourists.⁸³⁴ Perhaps as the best defense to an expected objection of unwarranted favouritism, one of the Clifton petitions entered a spirited offense: “Your petitioners cannot doubt that your Honourable Body would unhesitatingly refuse to permit the erection of a tollgate on King Street in Toronto and yet during the season of pleasure travel, free and uninterrupted passage up and down Niagara River...is as essential to the numerous persons and vehicles using it as is the free and uninterrupted use of King Street to the citizen of Toronto and the strangers who visit it.”⁸³⁵ The fact that private petitions/bills/acts tend to be reasoned, explicit, specific, and limited suggests that it may have

⁸³³ See 1871 (82), 1875-76 (194). Jones and McCalla state that Toronto council sought “expert legal advice at every stage” of a private petition, “Toronto Waterworks, 1847-77,” 304. There is also the indirect evidence of ‘legal’ paper, legal wording, and elegant calligraphy not found in the public petitions.

⁸³⁴ Such as license to hack cabs, etc. 1873 (441), against suspension bridge 1867-68 (464), against tollgate 1869 (385).

⁸³⁵ 1867 (385).

been well known that the legislature and courts would not suffer any general or expansive delegation of authority by which a local government would be able to modify its legal environment without continual supplication for the variation of every detail.

Given the trouble taken to achieve success for a private petition, the failures take on greater significance. It may be that some were not intended to succeed. A historian of the political manoeuvrings of the leather industry in Elizabethan England has observed that some attempts to obtain private legislation were clearly tactical exercises undertaken to publicise an issue, test the waters, or drum up support.⁸³⁶ Absent intensive research into the proceedings of individual councils, one can only speculate as to internal political considerations that may have directed the issuing of a petition for which there was little likelihood of success. It seems likely that in such cases the private petitions would, if possible, be framed so as to be classified as public (as was the case with the Elizabethan leather lobby), to minimize expenses.

The *Journals* show that private petitions were often withdrawn. Sometimes a withdrawn petition would be resubmitted, sometimes not. Many petitions seem to have been filed, never to be referred to again. In other cases, a petition resulting in an un-enacted bill might be resubmitted year after year. Perhaps this was a result of inexpert drafting, or perhaps of calculation by the corporate solicitor or insistence by the private bills committee that the latter would require frequent opportunities to review the situation before allowing extensions. Such resubmissions were customary where additional credit was requested. For example, the Town of Peterborough had its debt consolidation act amended eight times from 1867 to 1877. Four of these amendments were to enable the petitioners to raise money. As a municipality with a poor financial record, Peterborough required government approval to do anything more than pay current expenses and

⁸³⁶ D. M. Dean, "Public or Private? London Leather and Legislation in Elizabethan England," *Historical Journal* 31 (1988): 525-48.

into the sinking fund. In each case, the legislature allowed funds to be raised, on condition that they be used only for the stipulated purpose. Several of the other occasions must have been more annoying as undeserved. In 1868, for instance, the Peterborough trustees, who managed the money, were not unanimous; an amendment had to be obtained to allow the majority to act. The next year the amendment had to be submitted again. Because of an oversight, a clause had been included that had actually been voted down by council. In neither case were fees remitted.⁸³⁷

At least Peterborough eventually got what it asked for. Other urban centres were less fortunate. Like Peterborough, the Ottawa council was forced to keep returning, five times on the subject of waterworks and twice on an application to widen Broad Street. The waterworks acts were amended each time (again without remission of fees), but the Broad Street submissions were rejected on both occasions.⁸³⁸ Toronto City Council was defeated on three occasions. A bid to authorize gas works was lost after a petition was filed in opposition.⁸³⁹ A petition to separate Toronto from York county judicially because union was “so much trouble”—Toronto had apparently been converted to York’s point of view—was withdrawn at the bill stage, and in the 1876-77 session the city’s petition to change the names of several streets was withdrawn and fees refunded.⁸⁴⁰ A request to sell certain land unsuitable for a park was permitted, but only on the condition that the proceeds be used for a park fund.⁸⁴¹ Of all the major urban centres, only Hamilton seems to have been granted every piece of legislation it sought during these years, at least respecting the city proper. But an impassioned plea by Hamilton council to deny the Erie and Niagara Railway Extension, which they argued would seriously impair Hamilton’s

⁸³⁷ 1867-68 (83), 1868-69 (68), 1969 (3, 19, 58), 1871-72 (8), 1974 (35, 91).

⁸³⁸ 1873 (144), 1874 (6), petition of Canada Central Railway, 1874 (93), 1876-77 (166). It would appear that the Ottawa council had run counter to a railway company with more clout.

⁸³⁹ 1874 (244).

⁸⁴⁰ 1871-72 (189), 1875-76 (163), 39 Vic. c.62; Sydere, *General Index to the Journals*, 173, 149; 1867-68 (443).

⁸⁴¹ 1873 (494); Kingston’s first attempt to be allowed to mortgage its market property was “reported adversely” by the private bills committee, though the next year saw the act pass; 1867-68 (397), 1867-68 (42), 32 Vic. c.15.

investments in the Grand Trunk, and from their perspective no doubt the most crucial of all their petitions, was an exercise in futility.⁸⁴²

Nor did rural municipalities have everything their own way. Unlike their urban counterparts, rural municipalities tended to petition more for public legislation that would apply to all municipalities of a certain class. As well as the costs, there are other factors that may have been involved in this phenomenon. Undoubtedly it was more difficult to prove special circumstances that could justify a private act for many of the rural municipalities' desires, if only because they were more numerous than the urban centres. Perhaps as well rural councils felt the legislature would not allocate time to reforms that would affect a limited group number of people or give an advantage for which there was no rational basis. It is hardly remarkable that an appeal by the County of York, framed as a private petition—that is, to apply only to York—to allow it to regulate weights and measures was denied.⁸⁴³

“Restructuring,” for want of a better term, made up an important segment of the local governments' private petitions.⁸⁴⁴ Included in this category are petitions for and against annexation, changes in riding division, new provisional counties, “dismemberment” of old counties, separation of unions of townships, electoral and registration division, and judicial unions. These were topics that also seriously concerned individual ratepayers and gave rise to petitions from a number of informal groups as well as municipal councils. The legislature became the forum for conflict in almost every such instance, as any redistribution would affect tax bases and expenses, not to mention (as many petitions do) the inconvenience of a longer ride to the registry office or county town. Often a petition would not even be filed for a restructuring

⁸⁴² 1867-68 (433).

⁸⁴³ 1868-69 (8).

⁸⁴⁴ Exceeded only by railways.

before petitions were flooding in against it. Quick off the mark once the obligatory notices were published, local governments did not hesitate to advance their position with more than one petition to the same effect.

Municipalities were simply unable to ignore each other, though they may have wished they could. Boundaries had to be adjusted, boundary roads, bridges, and canals erected and maintained, and accounts settled respecting separation, shared jails, registry offices, houses of refuge, high schools, and other shared institutions and services. These gave rise to disputes ending up in court, in the private bills committee, or both. Indeed, one public issue on which several municipalities petitioned with success was a provision for arbitration of disputes about ditches to obviate the need for continual resort to the courts.⁸⁴⁵ That municipalities competed for the attention and favours of the government is not surprising. As the secondary literature reveals, urban centres in particular were in competition for everything.⁸⁴⁶ The private petitions also exhibit the “booster” tendency existing among the rural municipalities, although not always directly in their own behalf. It should not be forgotten that the immediate hinterland could have as much to gain by the process of metropolitanizing as the metropolis. Thus, Middlesex County petitioned vigorously for London to be awarded a normal school, while the London Council remained silent on the issue.⁸⁴⁷

It may be that the London Council felt petitioning for a normal school unnecessary due to their political connections, or useless for the same reason. It is impossible to do more than speculate on the influence of party and partisanship in the private bill process without going further behind the face of the record. But it is hard to suppose that party politics did not dictate

⁸⁴⁵ For example, 1874 (265), *An Act Respecting Ditching Water-courses*, 38 Vic. c.26 (1874).

⁸⁴⁶ Artibise and Linteau offer a useful compilation and critique of these works in *The Evolution of Urban Canada*.

⁸⁴⁷ 1874 (213).

victory or defeat for many of these private petitions, especially those that sought a “boon;” his biographer recounts the enraged reaction of Conservative premier John Sandfield Macdonald when the municipal council of Strathroy, which had returned a Liberal provincial member, importuned him to choose their town as the site of a new provincial prison.⁸⁴⁸ Teaford’s study of special (private) legislation states that local legislation was left in the hands of the “local delegation” in most states, but it is likely that under the Canadian system, the cabinet would have had much more of a say in decisions regarding private as well as public bills.⁸⁴⁹

Public Petitions

American legal historian Morton Horwitz, writing of the public/private distinction, states that “[o]ne of the central goals of nineteenth-century legal thought was to create a clean separation” between the two.⁸⁵⁰ The rules of the legislature made the distinction; the separation, however, is less clear when we look at the petitions themselves. Often the petition seems to be requesting a change in the general law but is actually seeking a specific exemption. It is not uncommon to find a statement such as the following: “Please amend the Municipal law to allow your petitioners to grant a bonus and to make legal debentures issued notwithstanding acts to the contrary,” the subject of one petition by the Town of St. Catharines.⁸⁵¹ Since the town was a regular petitioner, the councillors of St. Catharines would probably have known this request would go through the private bills committee; either “the Municipal Law” and the law pertaining

⁸⁴⁸ Bruce W. Hodgins, *John Sandfield Macdonald* (Toronto: University of Toronto Press, 1975), 89 ff.

⁸⁴⁹ Teaford, “Special Legislation and the Cities,” 193.

⁸⁵⁰ Morton Horwitz, “The History of the Public/Private Distinction,” *University of Pennsylvania Law Review* 130 (1982): 1423-8.

⁸⁵¹ 1871-72 (24).

to St. Catharines were regarded as one and the same, or the council was trying to avoid the private bills costs and procedure by fudging the distinction—possibly both.

Similarly, a number of “public” petitions contain a claim for exclusive relief in the alternative, such as the appeal by one township: “your petitioners view with alarm any attempt by legislation to deprive parties of rights which they have acquired under the existing laws....[We] pray the bill not pass or if it does please except the township of Smith.”⁸⁵² This plea may not be as naïve as it first appears. Many of the public statutes touching areas of municipal jurisdiction or responsibility contain schedules setting out different categories of status or selection. Any change in electoral boundaries, or in the location of a registry office would therefore be to the general law, although it stretches the imagination to think of these as particularly public (in the legal sense), in that they obviously affected only a small, discrete part of the population. Indeed, a request for an exemption *simpliciter*, or any change to the schedule of a public act would be an amalgam, beginning as a private petition, but not resulting in a private act. According to Hurst, this was a common ploy in the United States after abuses and scandals resulted in the passage of procedural and substantive restrictions on private and local acts in Congress and many states.⁸⁵³ Aside from the increase in fees over the ten-year period reviewed, no comparable developments occurred in Ontario, perhaps partly because the British rules of parliament already contained many of the reforms Hurst notes, such as publication, publicity, and readings of bills before enactment.

It is telling that the various petitions asking for aid for the victims of the fire that devastated the County of Carleton in 1870 were classified as private, although their real thrust is an implicit demand that a “private” matter be considered “public.” Interestingly, Carleton did not

⁸⁵² 1868-69 (653).

⁸⁵³ Hurst, *Growth of American Law*, 232.

appeal to the province itself, or at least not by means of a petition to the legislative assembly. Rather, the council approached other communities for help. Whether those communities that did petition the legislature themselves contributed is not clear from the petitions, but research in the area indicates that inter-community aid in cases of fire loss was a standard practice.⁸⁵⁴ Passing the charitable buck to the province may have been a factor in the fire aid campaign, as local governments were always looking for means to economize. This does not detract from the sincerity or cogency of the argument that private disasters are a public problem, and that it is “just” to spread the burden imposed by acts of God as widely as possible.

Such correspondence and cooperation between municipalities seems to have been fairly common. Occasionally, as in the case of the London normal school noted above, one municipality might have a stake in another’s private project. More often, solidarity was solicited by means of printed invitations to join in petitioning on a “public” issue. Interestingly, if the members of the recipient council were in agreement, they were asked not to subscribe to a single document but rather to send a separate request. At the beginning of this period, although printed form letters of supplication were sent, the recipient municipality was left to do its own drafting of the petition, even if it decided to copy the originator’s words, as many did, sometimes making slight amendments or deletions. By 1877, more fill-in-the-blank printed forms were being circulated. Some local governments still preferred to amend the form to make their own contributions. This was probably a futile gesture, as the petition was generally marked “to the same effect” by the clerk and filed with the group without note being taken of any changes.

It is difficult to tell whether participation in a concentrated group effort added to the ultimate success of a measure or whether chances were enhanced or diminished by standard form

⁸⁵⁴ See Weaver and de Lottinville, “The Conflagration and the City.”

or more contemplative hand-drafted efforts.⁸⁵⁵ Many municipal corporations in Ontario during this period filed at least one petition on the question of tax exemptions in one form or the other, to little effect. Eventually a select committee was set up to study the issue, but a thorough revision did not take place until the early 1880s. Perhaps, as has been suggested, such petitions created a climate for later reform.⁸⁵⁶ One specific exemption for civil servants that particularly raised the ire of the local governments of Ottawa and Toronto was repealed after only a few petitions over a few years.⁸⁵⁷ Nor does persistence seem to have been a determining factor. The County of Huron petitioned again and again for statutory permission to use statute labour to clear snow from the roads, and the County of Middlesex continued to harangue against the need for a grand jury (with some help from other counties and the bench as well), both only to be totally ignored; neither question even meriting a discussion in house or committee as far as I can ascertain.⁸⁵⁸

Needless to say, many solo attempts by local governments to change public acts also fell on deaf ears. It is probably not surprising that some of the more daring efforts—to pay county wardens a salary, to prohibit traction engines on highways, to prevent the obstruction of streams by mills and factories, or to set up public fire insurance—did not prosper, but neither did many milder requests.⁸⁵⁹ Petitions for the power to permit the owner of an impounded animal to redeem it before sale, to allow a separate ballot for every office to be filled at municipal

⁸⁵⁵ Most of the earlier exemption petitions are handwritten; the later ones are printed specifically for use by the municipalities. The earlier form petitions were designed for individuals and had to be adapted for completion by a corporation.

⁸⁵⁶ Eleanor Barnes and Danguole Jaczapavicius, *Select Committees of the Legislative Assembly of Ontario: A Checklist of Reports* (Toronto, 1983), 13-14. The authors report that Oliver Mowat, then premier and attorney general, suggested that the petitions did not accurately reflect public opinion. A select committee was set up in 1878. The next year, a second select committee analyzed the answer to a questionnaire sent by the first committee. This process the authors claim created a “climate for reform.”

⁸⁵⁷ 32 Vic. c.27 s.9.

⁸⁵⁸ 1875-76 (8); 1876-77 (1069); 1867-68 (425), 1868-69 (200), 1870-71 (50), 1871-72 (26, 28).

⁸⁵⁹ 1869 (843); 1871-72 (303); 1868-69 (798); 1871-72 (107).

elections, and to use statute labour for sidewalks, among others, were also ignored despite their apparent innocuousness.⁸⁶⁰

One might ask why local governments bothered to ask for such powers, rather than just carrying them out on their own, as it seems unlikely that the provincial government would mind any of this latter group of activities, or even discover them. One likely answer is that local governments were wary of potential court challenges by ratepayers or defeated candidates as to misuse of funds or electoral impropriety. The court reports are full of such cases; litigation seems to have been used often in local government power struggles. Local governments were also sensitive to the legal “doubts” that might threaten their credit. Perhaps municipal politicians were legally, as well as economically, conscious and conscientious. Their unsuccessful crusade by petition to reinstate the free distribution of statutes seems to point to such a mixture of motives.⁸⁶¹

Whether or not they were ultimately successful, these called-for amendments to the public law attest to the fact that, outwardly comprehensive and permissive as it seems, the Baldwin Act had hardly given municipalities the comprehensive latitude for self-government claimed by Taylor. If the above examples seem somewhat trivial, consider some weightier requests. St. Catharines petitioned to be able to acquire cemeteries by compelling the owner to sell at a price to be fixed by arbitration.⁸⁶² A singularly image-conscious and aggressive town, St. Catharines also asked twice that councils be allowed the power to plant shade trees and compel property owners to contribute to and maintain them.⁸⁶³ Several municipalities, led by Toronto,

⁸⁶⁰ 1875-76 (171); 1876-77 (1105); 1873 (691).

⁸⁶¹ 1870-71 (24, 32, 42, 144, 260, 315); 1871-71 (39); 1876-77 (1085, 1086). A provincial clerk seems to have felt these petitions were for aid rather than to change policy; the two latter petitions are marked to this affect.

⁸⁶² 1873 (691).

⁸⁶³ 1871-71 (79); 1873 (691).

wanted municipal corporations to be able to initiate drainage projects without waiting for a ratepayers' petition.⁸⁶⁴ Kingston twice petitioned to change the municipal act to allow councils to regulate (and charge license fees of) butchers operating outside the market.⁸⁶⁵ None of these petitions achieved its object during the years surveyed.

Because a private petition was prerequisite to a private act, there is a clear, if not necessarily consequential, relation between them. A public petition, on the other hand, could easily have been of little or no effect, even if an analogous measure was eventually passed, and it is tempting to sneer at the idea of a hamlet seriously petitioning on affairs of state. Indeed, Donald Akenson, in his study of nineteenth-century rural life, *The Irish in Ontario*, denigrates the petition of one council to the imperial parliament on the advisability of confederation.⁸⁶⁶ The particular petition, of course, is in hindsight insignificant, but had potential for impact in conjunction with others. The fact that the council thought it worth the bother speaks as much to their perception of their role as of their self-importance. Indeed, the number of public petitions to the Ontario legislature indicates that many councillors considered the exercise worthwhile, if only to add an additional democratically legitimated voice to one side or another of an on-going debate.

Not all public petitions concerned lofty matters, and it is easier to see the more commonplace efforts as sincere attempts at legal change. Several local governments petitioned for power to invest funds from the municipal loan and land improvement funds for educational purposes; they were successful, although not until there had been several years' agitation on the

⁸⁶⁴ 1875-76 (124); 1876-77 (421, 679, 1108).

⁸⁶⁵ 1874-75 (108); 1875-76 (72).

⁸⁶⁶ Akenson, *The Irish in Ontario*, 210.

point.⁸⁶⁷ Other petitions led to municipal powers to trespass on property to combat the spread of the Canada thistle.⁸⁶⁸ An amendment to the *Joint Stock Roads Companies Act* met petitioners' pleas for the power to confiscate roads and tolls if the company breached its covenant to maintain a certain standard of repair.⁸⁶⁹ On most questions of municipal structure and technical problems, such as changing the time for assessment, collection, and tax appeal to the courts, the legislature seems to have been extremely responsive to the much-vaunted experience of local councils. Indeed, most of the yearly amendments to the municipal and assessment acts appear to have originated with municipal petitions. The few exceptions, such as the refusal of the legislature to reinstate the election of mayors by council, or allow the division of townships into wards, seems as likely to have been the result of disagreement among municipalities as to reflect government policy.⁸⁷⁰

In some cases of widespread disagreement among municipalities, the legislature chose the local option alternative. One such case was the amendment of the *Dog Tax and Sheep Protection Act* in 1865-1866, the subject of considerable petitioning during the first few years after confederation.⁸⁷¹ Under the original scheme, all dog owners were to be taxed by the municipality to provide a fund out of which the owners of injured sheep would be reimbursed,

⁸⁶⁷ For example, 1868-69 (36); 1870-71 (25); 1874 (291, 427). The act was amended in 1875-76 (39 Vic. c.4) to allow investment in education, sectional bonuses or fire engines.

⁸⁶⁸ For example, 1874 (33); 32 Vic. c.42.

⁸⁶⁹ 1871 (12), 1873 (2); 1867-68 (569); 35 Vic. c.33; 36 Vic. c.41.

⁸⁷⁰ K. W. McKay, "Municipal History, 1867-1913" in *Canada and Its Provinces* vol. 17 Ontario, ed. A. Shortt and A.G. Doughty (Toronto: (Toronto: Brook and Co., 1914), 457-61, also 1867-68 (415) and 1868-69 (456), but 1873 (81) and 1874-75 (96) *inter alia*, contra. For a discussion of the "regress" and progress of municipal democracy, see Jarvis, "Mid-Victorian Toronto: Panic, Policy and Public Response."

⁸⁷¹ The Municipal Acts had allowed a tax on dogs at a township's discretion. By *An Act to Impose a Tax on Dogs and for the Better Protection of Sheep*, 29 & 30 Vic. c.55, the legislature set up a compulsory default insurance scheme, whereby the tax on dogs would be held to provide a fund to provide damages for sheep killed by dogs whose ownership could not be determined. This was amended in 1868 (32 Vic. 31) to allow municipalities to opt out. The scheme was a matter of considerable dispute among municipalities, partly because the funds were collected and maintained by the township, but dogs were no respecters of boundaries, and dogs from one township could depredate (or be accused of depredation of) a neighbouring jurisdiction; 1867-68 (5) *inter alia*, but see (162) contra. See also Chapter 4.

without having to resort to a civil suit against the dog owner (if the owner could be identified) to determine the latter's negligence. Established locales strongly supported the scheme, but the local governments and inhabitants of newly settled areas complained that the tax was onerous, that settlers needed dogs for protection against wild animals, that careless sheep owners were being unfairly subsidized, and that the fund was insufficient to pay damages. A select committee report challenged the truth of the last of these charges, but the decision was made to let each municipality opt in or out.⁸⁷² The compromise seems to have satisfied most of the municipalities on both sides of the question, but not all: the County of Victoria protested (by petition) that even the option was detrimental to sheep farming areas, since dogs from neighboring districts might be undeterred.⁸⁷³

Another example of resort to local option that did not meet everyone's expectations was the amendment of section 71(2) of the Assessment Act, an issue that also attracted numerous petitions throughout this period. By the Assessment Act of 1869, the province had determined that in "equalizing" (adjusting) the assessments of its subordinate units, a county was to discount the assessments of towns and villages by forty percent.⁸⁷⁴ The reason for this is unclear, but it may have been meant to reflect such shared burdens as streets used by rural ratepayers coming to market. Naturally, towns and villages supported this scheme and counties and townships did not. The rural element was victorious to an extent, when counties were finally given the discretion to discount or not in the 1874 session.⁸⁷⁵ The next year, however, three counties renewed their plea for complete repeal of this section, arguing that the amendment "causes unjust contention, and

⁸⁷² 32 Vic. c.31, 39 Vic. c.30.

⁸⁷³ 1870-71 (92).

⁸⁷⁴ 33 Vic. c.27.

⁸⁷⁵ 37 Vic. c.36.

occupies time,” with which appeal the legislature did not comply.⁸⁷⁶ On this, as on many issues, it was simply impossible to satisfy everyone. Feeling as they apparently did that the law was and should be in a state of flux, some local governments seem to have taken each reform as a challenge to point out new objections. Given this mindset, together with their own institutional and political imperatives, it is no wonder that members of the legislature failed to attend to every complaint.

The amendment of equalization provisions of the Assessment Act can be seen as an example of ascendancy of the rural majority over the urban minority, but this was not a universal occurrence. Another group of petitioners protested vehemently against the requirement that counties maintain bridges over a certain size in incorporated villages, only to have the provision changed to favour the villages even further.⁸⁷⁷ Such an “arbitrary” preference was stigmatized as “unjust,” and agitation to revoke the clause continued fitfully throughout the period.

The idea that justice consists in equality of treatment in and before the law is a recurrent theme in many of the local governments’ attempts at reform of public acts.⁸⁷⁸ The most coherent case of this was the extended fight to repeal tax exemptions. The Assessment Act of 1869 stipulated twenty-five categories of exemption from tax, including the ill-fated endeavour by the government to protect its employees from tax (presumably to save on salaries). Other exemptions seem less objectionable to the modern eye: incomes under one hundred dollars, pensions under two hundred dollars, incomes of military personnel and the Lieutenant-Governor, clergymen’s stipends, manses, churches, and churchyards were all excluded from assessment.⁸⁷⁹

⁸⁷⁶ 1875-76 (10, 11, 170).

⁸⁷⁷ 34 and 35 Vic. c.30, 30 Vic. c.48, 37 Vic. c.16.

⁸⁷⁸ See Marquis, “Doing Justice to British Justice,” 43-78, 51-53.

⁸⁷⁹ 32 Vic. c.36. For a discussion of wider consequences of Ontario’s concept of justice at a slightly later date, see A.I. Silver, “Ontario’s Alleged Fanaticism in the Riel Affair,” *Canadian Historical Review* 69 (1988): 21-50.

At first glance it would seem that the municipalities were simply trying to preserve their tax base, and no doubt economic self-interest was a potent consideration, as Ottawa reported one million and Toronto four million dollars' worth of property exempted.⁸⁸⁰ An impression of hypocrisy is introduced when it is observed that several local governments protested the move to include a tax on bank stock as personal property, and that several municipalities were also petitioning to exempt factories from tax as a "bonus." Yet to conclude that municipal politicians were men of property concerned to protect it (which they were) and pro-business (which they were), is to miss a crucial component. For one of the attacked exemptions, which must have benefited many of the rural council members as well as their constituents, embraced all income and produce derived from and personal property used in farming.⁸⁸¹ It would therefore seem that when rural municipal politicians argued that those who benefitted from "improvements" and services should help pay for them, they were reasonably in earnest. After all, bank stock dividends were already taxed as income, and the manufacturers who received bonuses gave value for the privilege in the form of conditions, reached through negotiation. Tax exemptions, it would seem, were to be available to those who could actually show cause in the public interest: *a priori* class exemptions in perpetuity without regard to circumstance were arbitrary and hence anathema in a "free and democratic" society.⁸⁸²

In a similar vein, several counties asked unsuccessfully for the discretion to reduce mandatory statute labour by those who were not assessable for property tax from two days to one, so that laborers could be encouraged to settle in the province. Again, this relief would have been adjustable, and the municipality would still be responsible for the shortfall and its

⁸⁸⁰ 1869 (367); 1876-77 (12).

⁸⁸¹ 32 Vic. c.36 s.9.

⁸⁸² For example, 1875-76 (45).

consequences. Justice as equality, then, did not preclude policy distinctions; these were to be made not theoretically, but empirically. It is noteworthy that several of the local governments in favour of the compulsory dog tax were uncomfortable with the strict liability aspect of the system, opining that it would be “more just” if sheep owners were not automatically rewarded for losses to which their own negligence might have contributed. Furthermore, they argued, sheep owners should have to prove their damages rather than receiving a “premium for carelessness.”⁸⁸³

The inference that “justice” had substantive as well as rhetorical meaning is borne out by an analysis of other public petitions. To take one example, in 1866 the legislature had made it mandatory that each county erect a House of Industry and Refuge within two years.⁸⁸⁴ Several counties began to build expeditiously, only to have the government, under pressure from those with fewer resources or less good will, make the provision permissive.⁸⁸⁵ Rather than merely ask to be reimbursed or dismantle the facility, the compliant counties asked that the others be again compelled to provide for their poor, or at least that the English law of settlement be applied so that the costs of providing for the province’s unfortunate would be borne more equitably. The County of Brant, which intended to but had not yet started to build a facility, asked that it be made mandatory for all counties, so their money would not be expended on those from outside their jurisdiction.⁸⁸⁶ Similarly, when some counties built prisons under a law granting a partial subsidy, which was later repealed, counties building later sought, and received, equal grants—no more, no less.⁸⁸⁷ Considering the fragmented tax base, it is little wonder that municipal councils

⁸⁸³ 1867-68 (528); 1871-72 (310); 1868-69 (826, 827); 1867-68 (504); 1875-76 (170).

⁸⁸⁴ 29 Vic. c.12 s.413.

⁸⁸⁵ 31 Vic. c.12 s.413.

⁸⁸⁶ 1870-71 (276); 1873 (77).

⁸⁸⁷ 31 Vic. c.7, 37 Vic. c.31.

as trustees of the propertied were wary of freeloaders yet supportive of centralized welfare, such as the aforementioned fire aid grant and the ophthalmic hospital. Indeed, the largest number of municipal petitions filed on any subject were those praying for provincial support of the latter institution.⁸⁸⁸

That saving the ratepayers' money was not their sole concern is also illustrated by the local governments' attitude toward the reform of the *Registry Act*. Throughout the decade, several counties implored the government to allow payment of registrars by salary rather than by fees. The government responded with a sliding scale to limit the registrar's percentages, which left the counties unsatisfied.⁸⁸⁹ It may be that they contemplated that the provincial government would pick up the tab, but the petitions do not even hint at this, and it seems unlikely. When gaolers began to be paid by salary during this period, their salaries were provided by the county.⁸⁹⁰ Another possibility, that the counties detected a profit to be made, is also negated by the fact that they were simultaneously petitioning to lower the fees charged for the registration and searching. Fees for registration, which were fixed by the transaction, not the value of the property, would have been hardest on the poorest and especially on those who were frequent mortgagors, although speculators would also be affected.⁸⁹¹

A campaign for the reform of the laws regarding the *Administration of Justice Act* and the *Jury Act*, and particularly for the repeal of the grand jury, may have been similarly prompted.⁸⁹²

⁸⁸⁸ The hospital for the blind (ophthalmic hospital), located in Brantford, was given a measure of provincial support, to be in the discretion of the inspector, in 1873: 36 Vic. c.32 s.3.

⁸⁸⁹ 35 Vic. c.28.

⁸⁹⁰ 36 Vic. c.48 s.58. Although the counties had to foot the bill, the amount fixed was subject to revision by the provincial prison inspectors.

⁸⁹¹ See Gagan, *Hopeful Travellers*, and more particularly David Gagan, "The Security of Land: Mortgaging in Toronto Gore Township, 1835-95," in *Aspects of Nineteenth Century Ontario*, ed. F.H. Armstrong et al., 135-53. Gagan argues that mortgaging was common as between father and son where no money changed hands, to ensure security for the parents and other children. In such a case registration fees would be particularly burdensome as there would be no proceeds out of which disbursements could be made.

⁸⁹² 32 Vic. c.6.

The petitions cite the inconvenience to farmers of travel without pay and unnecessary attendances at harvesting time. Again, this campaign was only marginally successful, resulting only in concessions that travel expenses would be compensated and special jurors would be paid.⁸⁹³ There may have been another ulterior motive involved respecting the grand jury, however, which may explain the provinces' reluctance to comply on this point. As discussed in Chapter 6, the grand jury could be a considerable irritant to the council by reporting adversely on the condition of the county prison and requiring the maintenance of lunatics and the "indigent sick."⁸⁹⁴ On a parallel issue, the government agreed that crown witnesses could be compensated. The payments would be shared by province and county, with the county assuming the lion's share.⁸⁹⁵

As these concerns remind us, municipal councils had by no means complete control over their revenues. Challenges to fiscal autonomy such as the requirement for a Board of Police in the larger towns and cities, which transferred power from municipal councils without relieving financial obligation, were strenuously, though unsuccessfully opposed.⁸⁹⁶ One partial exception to this succession of losses was the crusade of some local governments against the "grouping clause," by which railway companies were for a while practically able to guarantee themselves a bonus by selecting only townships favourable to their cause to hold a vote on the question.⁸⁹⁷ A wave of resentment against this gerrymandering scheme, expressed in concentrated petitioning, seems to have resulted in the rescission of the section. The City Council of Toronto, however,

⁸⁹³ 32 Vic. c.13, 38 Vic. c.14.

⁸⁹⁴ See Chapter 6.

⁸⁹⁵ 36 Vic. c.13. The county was reimbursed for a third of the extra expense.

⁸⁹⁶ 36 Vic. c.48, 37 Vic. c.16.

⁸⁹⁷ 39 Vic. c.26. The "grouping" clause originated in a private act inspecting the Fenelon Falls Railway Company (34 Vic. c.43); it entered the Municipal Act in 1873 (36 Vic. c.48) and was repealed the next year (37 Vic. c.16).

continued to complain that municipalities were still forced to pay for a poll at a railway's initiative.⁸⁹⁸

As S.J.R. Noel has recounted, municipal fiscal issues were extremely delicate and momentous in early post-confederation Ontario. His discussion of the Municipal Loan Fund portrays a conflict between considerations of public justice and private advantage. Solvent municipalities were concerned lest the government grant "unfair" subsidies, whereas from the perspective of the insolvent, these was nothing unfair in the province assuming deficits that it had implicitly or explicitly countenanced.⁸⁹⁹ Noel considers the "brokering" of a solution to these apparently irreconcilable interests through the Municipal Loan Fund Indebtedness Act of 1873, by means of a formula whereby the latter's debts were underwritten on easy terms and the former allowed matching grants, to be one of Premier Oliver Mowat's greatest triumphs.⁹⁰⁰ However, Noel's assessment that there were few restrictions attached to the grants is not borne out by a series of petitions that followed the act. These petitions asked either that the decision as to acceptable expenditures be left entirely to council or set out further desired heads of appropriation, most notably schools.⁹⁰¹ In the 1875-76 session, the act was duly amended to add schools, fire engines, and sectional bonuses to railways to the list, these being only a few of the changes requested, and far from the total discretion hoped for by some.⁹⁰²

⁸⁹⁸ 1874 (154). The council claimed that the city had granted seven hundred dollars in bonuses, complaining that on the petition of a few ratepayers they were required to hold a minor election costing sixteen hundred dollars. They also wished to require that the by-law not pass by a majority of votes cast but by a majority of all entitled to vote and that promoters defray the expenses of the vote.

⁸⁹⁹ Noel, *Patron, Clients, Brokers*, 243-46. Noel is unusual in his recognition of the importance of municipalities at this stage of provincial history.

⁹⁰⁰ 36 Vic. c.47; Noel, *Patrons, Clients, Brokers*, 246.

⁹⁰¹ 1874 (212, 221, 291, 302, 314, 315, 348, 360, 391, 429, 430).

⁹⁰² 39 Vic. c.4.

Conclusion

For the legal historian, petitions present an opportunity to examine aspects of the legislative process that have tended to escape notice. In this chapter I have demonstrated that elected members of many Ontario local governments during the decade 1867-77 had no doubts as to their prerogative to advocate for legal change as institutions (rather than as individuals), believed that it was worth the effort involved, and had decided ideas about what norms that they believed the law should embody and the form their legal environment(s) should take. Although extensive research would be required to show that any one of these petitions was the cause of ensuing legislative changes, it can be said that they enjoyed a problematic degree of success; sufficient to fuel the continuing phenomenon, yet uneven, uncertain, possibly expensive, and probably frustrating. Because the range of local governments' activity was great and their interests diverse, there are myriad instances and varying degrees of successful and failed petitioning. I have concentrated on issues that seem to have had the most significance for those concerned, with the exception of education. While often concerned with schools and schooling, on these matters the municipal councils took a back seat to the Boards of School Trustees, who generally seem to have been the instigators of municipal petitions on school issues.

Much remains to be unearthed about post-confederation Ontario local governments and their place in legislation and politics. The sheer number of petitions for legal change from municipal corporations demonstrates that these entities were far from autonomous. Yet they were not without considerable agency. While conscious of frustration, municipal councils had confidence in their duty, competence and ability to revise the law through petitioning, which does not appear to have been entirely misplaced. Clearly, mid-Victorian Ontario municipalities lacked the power to control their legislative environment Teaford finds exhibited by some

contemporaneous urban American centres. No doubt this was at least partly due to the more highly centralized, executive-dominated governmental structure in Canada West/Ontario. Still, internal contradictions likely did much to undermine the effectiveness of municipal councils, as their conflicting roles as booster institutions engaged in “private” progress, and as local fiduciaries concerned about “public” justice, could not but complicate their authority in the legislative process. Furthermore, municipal agency was undermined by municipal multiplicity: the gain of one municipality, or group of municipalities, could be the loss of another, whether the issue was public or private. The success of one petition could, and often did, entail the failure of others.

As for petitions, it is evident that a mode of legislative participation that began as a precursor continued during this period as either adjunct or alternative to representative democracy. The volume of petitions alone is an indication that the Member of Parliament had not replaced the petition as the principal conduit of communication from a governed to governor. The evidence that petitions from council were considered to have greater clout than those from individuals also indicates that MPPs had competition from municipal councils as the recognized representatives of the electorate. Ultimately, though, their lack of (constitutional) legal standing meant that their influence would be both indirect and variable.

The dissonance between municipal councils’ desire for political influence through participation in legislative change and the weakness inherent in their non-existent constitutional status is perhaps best expressed by the actors involved. Shortly after the end of the period under consideration, Leeds and Grenville counties received a circular from the County of Simcoe. The relevant text begins with an excerpt from the warden’s opening address of the year:

As this is the age of progress not only in arts and industries, but also in legislation tending to the advancement of the material prosperity of the country, I

trust I may be pardoned for introducing the subject...calculated to attract the attention of the Province. There are many subjects affecting municipal government which the people find some difficulty in forcing upon the attention of the Local Legislature, such as assessment, drainage, reclaiming wasted lands, agriculture, schools, limitation of municipal indebtedness, protection to municipalities having given bounties, extension or contraction of county boundaries, discrimination in freight tariff on railways, &c., &c. These subjects demand the careful attention of our law makers, and I would suggest that this Council propose a general conference of Wardens, to be held annually in Toronto, for the purpose of discussing matters of such general public interest, and bringing their conclusions before the Government in a practical way. Local municipalities would then instruct their Reeves, who at a regular session would introduce the subject to the County Council, and their representative, the Warden, would thus be able to propose amendments to the Municipal law at the general conference. It should be the means of placing the views of the people, through their representatives, before the Government, and it would also give the Government an opportunity of consulting men of municipal experience on proposed amendments.

The Leeds and Grenville council referred the remarks to a select committee, which agreed

[i]t has been the custom of the Various County councils to the Province to petition the Legislature from time to time respecting needed changes in Municipal Law, but these petitions representing in most cases the opinion of a comparatively small section of the country have often passed unnoticed. But your Committee believe that suggestions, emanating from a thoroughly representative body composed in a great measure of gentlemen of large experience in Municipal matters, would receive from the Government and Legislature the most careful consideration.⁹⁰³

Whether because other counties were unreceptive, members of the legislative assembly jealous of the implied challenge to their position, or the cabinet unwilling to set up an organization that could act as a forum for dissent, nothing came of this idea. Local governments continued with their petitioning, neither impotent nor omnipotent, not partners in the political apparatus, but partakers in the process of legislative change.

⁹⁰³ Leeds and Grenville council papers, 1879 (d). Note that cities and separated towns are conspicuous by their exclusion from this proposal.

Chapter 9: Conclusion: Law, Autonomy, and Local Government in Canada West/Ontario, 1850-1880

The local governments of Canada West/Ontario, constituted as municipal corporations under the Municipal Corporations Act of 1849, were not ‘autonomous’ during the years 1850-1880.

Although freed of the provincial government control and constraints on revenue raising that marked the predecessor legislation and not yet subject to administrative boards and controls, municipal corporations in the thirty years following the proclamation of the Municipal Act were bound by law and the legal system. Still, it appears that these institutions of mid-nineteenth century Canada West/Ontario local governance had considerable agency, an overall common purpose with higher levels of government, an understanding of their importance within the system, and some ability to express community norms and affect their legal environment. Delegated though it was, there is no doubt that local governments had a great deal of power, at least as far as the *scope* of government is concerned. Many functions performed by ‘high’ governments in the present day, including taxation, health and welfare, the building and maintenance of infrastructure, and much social, moral, and environmental regulation, were either exclusively or mainly matters for local government in the mid-nineteenth century.

The historiographic question raised by the literature canvassed in chapter one as to whether the Baldwin Act was designed more to bring (a limited) democracy to the community level, or to facilitate economic growth as part of a provincial or imperial agenda promotes a false, perhaps an irrelevant, dichotomy. There is certainly evidence in the ‘must’ and ‘may’ clauses in the Municipal Act, 1849 to support both points of view. However, the two goals were never at odds. Since the settler population was likely to support market expansion and economic growth in its own interests, the empowerment of elected local governments could be expected to

serve that goal, as well as to be an end in itself from the viewpoint of liberal political philosophy. But the immediate hopes and intentions intention(s) of the designers aside, the act clearly had a deeper legal-structural purpose. As the commission set up in the late 1880s to report on municipal government put it, the act was a “Municipal Magna Charta.”⁹⁰⁴ Much like the BNA act, it was not to be a compendium of all relevant structural law for all time, or even its own time, but was a ‘who does what’ practical constitution for low governance.

As I observe in Chapter 1, the act and its successors provided a jurisdictional framework for low governance and administration, with some prompting as to appropriate agenda, augmented by collateral legislation and tweaked by frequent amendments. It is tempting but impossible to discern a linear pattern showing that these expanded or contracted local government autonomy. Changes followed the template of particularity, and therefore often just expanded the subjects of possible government action, rather than the degree of freedom with which these could be pursued. The residual POGG-type provision included in the 1849 act could have provided a statutory basis for expanding local government power at a municipality’s initiative, but the clause was short lived. On the other hand, the change in control of police boards a statutory change appeared to start a decline in one aspect of municipal autonomy, but was reversed after a few years.⁹⁰⁵ The concept of autonomy presumes a primary binary relationship between the community and the province but the acts make it clear that the most immediate inter-governmental relationships, and those that were expected to cause conflict for local governments, were between municipalities of the same or different tiers, and between municipalities and other low law/low government entities. Thus more power to the local

⁹⁰⁴ Municipal Commission and Ontario Legislative Assembly, Sessional Papers, 1889, no. 13, vol. 2 (Second Report of the Municipal Commission), 1889, 55.

⁹⁰⁵ For example, urban municipalities’ loss and then regaining of control over boards of police referred to in Chapter 2.

community—whether of immunity or initiative—would necessarily affect and perhaps diminish the autonomy of other units.

The drafters of the Municipal Acts attempted to mediate these conflicts by arbitrary rules, but also anticipated that further mediation would be necessary by means of the judicial system and arbitration. To say that the Municipal Act was a low constitution is not to suggest it was without direction. It is true that the act gave a new fiscal freedom to municipal councils, and for the most part suggested, rather than insisted on, matters on which property taxes could be spent. In this sense there was room for local government agency. But there was clearly little autonomy. Even in the facilitative sections, it is evident that the options of municipal councils were legally constrained, both as to subject, and by means of internal and external conditions. A number of ‘powers’ were limited by the wording of the clauses that set them out, by adjectives and adverbs that could invite judicial second-guessing of council decisions. Others, especially those with a monetary aspect, included pre-requisite and co-requisite conditions such as recitals, notice, initiating process by specified ratepayer petitions, together with process for objection. Because the corporation was a ‘person,’ an entity separate from the ratepayers it represented, one or a group of ratepayers had many avenues to stymie corporate plans.

As for the mandatory clauses, the provincial priorities associated with economic development, such as the maintenance of such infrastructure entrusted by the acts to the municipality, are discernible throughout the act. Just as central to development were the requirements for compulsory participation in the province’s information gathering process, given extra impetus by personal penalties on clerks for non-compliance, and less directly the more general duties relating to honest and efficient administration. As well, some specific duties were set out by the education, registry and other acts that centred on other agencies of low law. The

expenses of these, over which the municipal councils were given no control or input, were charged to the locality. As well as the quasi-criminal liability by means of fines and imprisonment placed on the municipal officers and politicians, all mandatory tasks were supported by civil forfeiture against the corporations. Sheriffs were specifically empowered by the statute to execute judgments against the ‘private’ property of the corporation. Also key in this regard was the ability of the province to withhold funds due a municipality from its share of the clergy reserves fund. In addition, references to mechanisms of judicial review punctuate the statutes; municipal corporations were answerable to the province both directly and indirectly.

The reported cases as a whole and the three subsets examined in Chapter 3 support the conclusion that judicial oversight, while random and rare, at least at the high court levels reflected by the case reports, was a threat to municipal autonomy that was always to be anticipated. Of course, municipalities could and did invite judicial intervention themselves, although at least at the high court level they were far more likely to be defendants. Municipalities persisted with their own claims most often against other corporations, either powerful commercial corporations such as railways, or other municipal corporations or Boards of School Trustees with their own legitimacy and public standing. Judges might sympathize with councils over the threats to community funds and the problems attendant on climate, geography, poor legislative drafting and conflicts with other low institutions, but they remained vigilant against error, whether ingenuous or disingenuous, and conflicts of interest.

By the prerogative writ of mandamus, ratepayers or other parties could employ the power of the state to force municipalities to fulfil their obligations. The remedy had originally been an individual one, and the institutional character of the municipalities, and also the democratic legitimacy of elected councils, did give rise at first to some trepidation on the part of judges who

would have preferred the use of criminal procedure in road maintenance cases and the protection provided by viva voce evidence and juries in civil cases. However, they adjusted, going so far as to ease standards to make the remedy easier to obtain as time went by, and often gave unsuccessful complainants advice on how to better their chances, on the likely assumption that the applications were but one salvo in a lengthier political struggle.

The right of ratepayers and others to bring actions to ‘quash’ by-laws for illegality was a second mechanism whereby municipal action could be thwarted, or at least, scrutinized. From the outset the courts made it clear that no amount of democratic clout would be allowed to prevail over the rights of an individual to rely on the rule of law, at least in theory. In most cases courts preferred certainty, but they could not escape the fiscal disaster that quashing a money by-law could have, so were less stringent in such cases, while still taking care to warn municipalities that even if they did not quash the by-law, ratepayers could still raise civil challenges. The quashing cases demonstrate that efforts by municipal councils to extend their jurisdiction and autonomy were rare. A few attempts were made to counteract the rules against conflict of interest and self-dealing, but otherwise municipal councils seem to have been uninterested in pushing their statutory limits, although the town of Clifton did try to use the short-lived ‘general power’ to deal with unlicensed tourism entrepreneurs. This kind of specific increase in power, along with the ability to provide tax exemptions for manufacture, would be left to the legislature to accommodate. Also in opposition to municipal autonomy was the increasing willingness of the courts to use their discretion to look beyond the lack of errors on its face to void a by-law by reason of deficiencies in the ‘extraneous factors’ of the by-legislative process. Also marked—more so by the end of the period—was a judicial preference for the protection of the public purse over the rights of council to make financial choices on behalf of their constituency. However, while they were distrustful of

municipal councils, the high courts, especially when under the leadership of Chief Justice Robert Harrison, also showed little deference to the legislature, for example choosing to protect their own power to scrutinize and disallow municipal action, allowing common law values such as the ‘liberty of the subject’ to trump the provincial priorities of temperance, and publicly criticizing the legislature for errors in drafting that caused problems for municipalities and other parties.

The cases in which a municipality was sued for liability for damages to persons or property arising from negligence or nuisance were complicated by the involvement of a jury, and the reports make clear that juries were more apt to be generous to plaintiffs than were judges. Still, even in cases where juries decided in favour of plaintiffs, awards were often reduced on appeal. The fact that the liability cases, although relatively few, were considered legally significant is attested to by the length of the decisions, and the inclusion of similarly lengthy dissents and the volume of case law cited and considered especially foreign law, all of which was unusual for municipal cases. Courts allowed the common law to augment municipal responsibility, but not to excuse it (with the exception of the concept of notice). Whatever the legal standard of causation, proximate cause or contributory negligence the courts decided on, they still made it clear that only the most ‘eligible’ plaintiffs could expect benevolence from the bench. Also relevant were local conditions: longer established, richer municipalities were expected to meet a higher standard of road repair, a standard that rose over time with the development of the province. The fact that roads had economic importance seems to have been an unspoken factor; no situational excuses or requirements were allowed for sidewalks, which were viewed as an amenity, not a necessity.

The mandamus, quashing and liability cases are all evidence that the ballot box and press were not the only real checks on municipal councils. Clearly, any consideration of power between the province and the locality must include the judicial system as a third party. The reported cases

are evidence that while municipal councils did generally accept the law and legal system they were prepared to work within it to achieve their objectives. Cases in which one municipality was a plaintiff and another was a defendant complicate any easy conclusions that the courts would favour a municipal party or not and problematize the binary premise of the locality versus the centre.

The sense that the law was a danger to municipalities, their councils and their officials was reinforced during the period by the for-profit publications that municipalities almost certainly used as their primary source of legal information. In Chapter 4 I have discussed the ways that authors and publishers reproduced and framed the official sources of law according to their assessment of the needs of their customers, or what they could persuade the customers were their needs, attempting to add to their marketability by emphasizing the risks accompanying statutory duties and restrictions. No two authors or editions identified the same selection of acts or cases that official sources presented, but it is apparent that these were numerous, belying the common equation by scholars of municipal law with the Baldwin Act alone. The law for municipalities revealed by these publications comprised not just the original act and its amendments, but also collateral statutes, and a constantly growing jurisprudence. The lack of autonomy of local governments was the premise for all these publications, and it continued to be in the material interest of the publishers to stress and even exaggerate this aspect of the law. The legal environment for municipal actors became progressively more legalistic, as the layman as legal author gave way first to the lawyer as legal author. The final step in this progression was to the lawyer as lawyer: as the law detailed by the publications became more complex, the legal position of councils and staff appeared more uncertain, and the shadow of the law darker through the repeated warnings of the authors, the municipalities became more likely to turn to professional help rather than to self-help reference materials. Whether or not the law filtered by

either of these resources matched the actual experience of municipal actors dealing with the law is impossible for us to say, as it was impossible for them. Prisoners of an information system and information providers who were biased in favour of erring on the side of caution, the legal environment produced by these publications was antithetical to the concept of local government autonomy.

In Chapter 5 I considered the law-related experience of one municipality, the United Counties of Leeds and Grenville. The councils and their staff acted in the shadow of a law that the municipal records show was omnipresent, either directly or as subtext. The actions of council and its staff may not always have been true to the letter of the law, but were always expressed as such—they were overtly ‘legalistic.’ County councils relied on their clerk and treasurer to get things done within the law, for which service they were prepared to pay relatively well. But while both councillors and staff referred and deferred to the letter and spirit of the law, they varied in the degree of care with which they acted. Legal reference material was valued, although less at the end than at the start of the period. Solicitors were relied on more and more as time went on, although always on an ad hoc basis. Legal conformity was not the only priority. The council did not terminate their Treasurer when the latter transgressed technical rules, and indeed took advantage of his legal nonchalance by making use of his personal credit. Similarly, they were flexible about statutory requirements for arbitrations, transforming these into mere formalized negotiations.

Though the council showed a readiness to follow legal process in the pursuit of municipal goals, this too was adapted to circumstances. The quasi-judicial petitioning system to determine expenditures led to uncertainty and a lack of objectivity, and during the period began to be replaced, or at least supplemented, by pre-determined grants. Contracts as well as by-laws were

legally required for the corporation to act, so were duly entered, seemingly in good faith, although not always properly executed. But even as standard forms gave way to professionally drafted contracts, the impracticality of the tendering system and acting through contractors became manifest. Still, despite continual failures arising from the disconnect between economic reality and expectations, the Leeds and Grenville councils resisted the move from a contract-based model to a permanent work force, re-negotiating smaller contracts and downloading responsibility for road improvements to subsidiary municipalities.

By necessity the councils used the judicial system to press the counties' own claims, and were unable to avoid the legal claims of others, but lamented the costs even when they were successful. A clear preference for negotiation over judicial or arbitral process grew stronger over time. The councils, their staff and lawyers were occasionally creative in finding solutions to legal problems, as for example when they took advantage of their right to establish tolls to evade their statutory responsibility in their dispute with the Village of Gananoque. Similarly, they made use of their spending power to exact what might be considered extra-legal policy concessions—free education—from school boards who were not legally required to provide them. However, when the matter was not a council priority (and there were legal alternatives) they also relied on law as a reason for inaction, as in the decision not to fund welfare requests. When facing a legal quandary involving the Johnstown property, when high law, a competing agency of low law, and political circumstances converged against them, they made use of legal professionals and tried various options until they were successful. While undoubtedly 'a creature of the province,' operating in the shadow of provincial law, the freedom of the municipal corporation of the United Counties of Leeds and Grenville to raise revenue beyond what the common law and the

province commandeered, together with the help of legal and extra-legal tools allowed for a degree for local government initiative and agency.

As I noted in the introduction, the lack of administrative supervision over municipal corporations in mid-nineteenth century Canada West/Ontario has led some scholars to conclude that councils were basically free to act as they saw fit. In Chapter 6 I argued that this assumption is incorrect in one important area of municipal jurisdiction. Two types of overseers provided a check on municipal action in matters of incarceration; one through the old regime *ex tempore* institution of the grand jury, the other permanent ‘new regime’ inspectorates, precursors to the default mode of scrutiny of the administrative state. There is no question that the grand jury of the quarter sessions had a ‘hard law’ quasi-judicial role in the determination of eligibility and quantum of support for the ‘destitute insane.’ However, with this exception, the non-criminal presentments of the grand juries in mid-Victorian Canada West/Ontario lacked an enforcement mechanism; they were what is now categorized as ‘soft law.’ In spite of this, grand juries may have been the more effective of the two.

Grand jury ‘presentments,’ a traditional form of input by the local gentry, or in Canada West/Ontario the local elite, probably had an indirect influence on the policies and the politics of the provincial and federal governments. As far as matters of local governance are concerned, the effect of the grand juries and the inspectors resist easy, or indeed any evaluation, but the evidence is suggestive. County councils were critiqued by both in regard to their administration of the gaols, often simultaneously and in conjunction or syncopation with gaolers, sheriffs, doctors, and the press. Even their own members sitting in property committees manifest the influence of the grand juries, as their agendas and gaol reports came to mimic grand jury presentments. The experience of the United Counties of Leeds and Grenville may not have been

typical, but there is no reason to think that it was not. The record is unclear, but it suggests that the municipal council was just as, or more, likely to be influenced by the opinions of grand jurors as by those of provincial inspectors on gaol-related issues.

Between the old and new systems of supervision, the municipal county councils of Canada West/Ontario during the thirty years after the Baldwin Act were never left alone to exercise the power the statute gave them over local correctional facilities. Still, the grand juries though persuasive, were impermanent. As for the inspectorates, these were under-staffed, their surveillance intermittent, and their successes far from automatic, or even easy. Despite the onslaught of scrutiny both hard and soft, the municipal council of the United Counties Leeds and Grenville was able to exert some independence, if only to the extent of delaying inevitable compliance. But in this area at least, it is clear that the ‘power’ over gaols ostensibly given the county councils by the Municipal Act was easily compromised by the will of the legislature enforced through its new regime bureaucrats, and perhaps even more by the lay participants of the old regime judicial system.

Historians and political scientists hailing the Baldwin Act for bringing about local government independence point to the freedom to raise and spend revenue at the lowest community level introduced by the act. In Chapter 7 I examined the records of three township councils and their courts of revision in Leeds and Grenville counties for evidence of autonomy in their implementation of the tax laws. The townships of Augusta and the Rear and Front of Leeds and Landsdowne during the thirty years following the implementation of the Baldwin Act in Canada West/Ontario were not particularly ‘legalistic’ whether acting in committee as courts of revision or as quasi-administrative tribunals in their capacity as municipal councils. For instance, even when following the law to the letter, in the matter of clergy exemptions, they chose to

appeal to custom to legitimate their actions. The records of their decisions never cited the by-law or law involved; where they gave a reason for the decision, they referred to policy or natural justice. All three townships demonstrated a somewhat relaxed attitude toward the statutory minutiae of dates and deadlines, and the distinction between court of revision business and that of council.

On tax matters, as on most other subjects, the councillors of the three townships showed a remarkable consensus over the thirty years canvassed. Tax forgiveness was not controversial. Municipal revenue was theirs to spend as they wished, or at least as not specifically prohibited, the right to forego its collection would seem to follow logically, whatever the legislation might say to the contrary. The identical membership, meeting place and clerk for townships councils and courts of revision probably encouraged them in a tendency to deal with tax appeals in the same way, and according to the same standards, as other claims and issues. There are instances of political or personal bias, probably more than is indicated on the face of the record. No doubt councillor-revisors shared and reflected the expectations of their constituents, propertied by definition, whose petitions set the agendas of council meetings.

It is clear that in following or departing from the law, the mid-Victorian councillors of Augusta and Leeds and Landsdowne, Front and Rear, did not act as predatory administrators. Not that they neglected their duty to raise funds. The assessment laws, and the public priorities they are alleged to have embodied—the encouragement of improvements in infrastructure, and indirectly the economic progress which local taxes made possible—provided the expectations, while the specific circumstances brought to council or the court of revision compelled the exceptions. When law and economic policy—shared by all levels of government—came into

conflict with concerns of mercy and justice, the councillors could be swayed by facts and ‘local knowledge’.

For these three townships, municipal law facilitated, or at least permitted, a small sphere of autonomy in a key aspect of local governance. It is impossible to tell how far these findings pertain generally to municipal governments in Canada West/Ontario. But since the majority of the voting population of the settler society of Canada West/Ontario were residents of townships, and since local taxation was the only direct tax to which they were subject, these observations should be taken seriously in any evaluation of local autonomy at this time.

In most of this dissertation I have looked at local autonomy from the perspective of the ‘legal scale,’ the immunity municipal corporations enjoyed and the initiative permitted by the legal apparatus of the provincial state. In Chapter 8 I considered the political scale—the ability municipal corporations may have had to affect the law that established the parameters of action. Looking at the petitions sent to the province during the decade 1867-77, it seems that members of municipal corporations seem to have had no doubts as to their prerogative as law institutions to advocate for legal change; that they believed that it was worth the effort involved, and that they had decided, if sometimes divergent, ideas about the form their legal environment(s) should take. It is clear, however, that municipal corporations were advocating, not dictating, to higher levels of government. Petitions from municipal corporations can be said to have enjoyed some degree of success; uneven, uncertain, possibly expensive, and probably frustrating, yet enough that the effort seemed worthwhile.

The sheer number of petitions for legal change from municipal corporations demonstrates that the latter were far from autonomous. Yet they reveal a strong sense of agency. Municipal councils had confidence in their duty, competence and ability to revise the law through

petitioning, which does not appear to have been entirely misplaced. No doubt at least partly due to the more highly centralized, executive-dominated governmental structure in Canada West/Ontario, mid-Victorian Ontario municipalities lacked the power to control their legislative environment attributed to some urban American centres under policies of home rule. However, the undifferentiated legal character of municipal corporations, without making distinctions of type except for gradations within a single category likely did much to undermine the effectiveness of municipal councils as lobbyists and law reformers. Their conflicting roles as boosters engaged in the promotion of private progress, and as low governance fiduciaries concerned about public justice also diminished their authority in the legislative process. Furthermore, their voice was diluted by sibling rivalry: the gain of one municipality, or group of municipalities, could be the loss of another. The success of one petition could, and often did, entail the failure of others. The volume of petitions from municipalities is an indication that the Member of Parliament had not entirely replaced the petition as the principal method of communication from governed to governor, and that members of the low governments could challenge members of high governments to be the recognized representatives of their communities. Nevertheless, their lack of constitutional standing meant that low government influence would be both indirect and sporadic, as political will may always challenge, but rarely triumph over the embedded authority of legal superstructure.

William Novak writes that “law was the modality of governance” in the nineteenth century United States; this is also true of British North America.⁹⁰⁶ Certainly, law is key to the understanding of municipal corporations and their place in the operation of governance in Canada West/Ontario. In this dissertation I have attempted to show various aspects of the ways

⁹⁰⁶ Novak, *The People's Welfare*, 12

in which, in the period from the coming into effect of the Baldwin Act to the advent of the urban reform era, municipal corporations were in effect the focal point of a ‘micro-culture’ of low law.⁹⁰⁷ Low law, of course, is still with us, albeit much transformed, and municipal corporations are no longer the keystone of the system. Just as the nineteenth century municipalities superseded the justices of the peace, municipal corporations and other institutions of low law of the mid-Victorian period have been superseded in importance by the administrative boards and government agencies of the twentieth and twenty first centuries. Law still provides the framework for governance, but it no longer constitutes the ‘modality.’ Conurbations, rather than counties, are now the drivers of the economy, and loom so large in the academic and popular imagination that other units are not even considered when question of municipal power are debated. To a certain extent, to raise the question of mid-Victorian local government autonomy is an anachronistic exercise. In absolute terms local governments in the period were not autonomous, but while specific facets of the laws were irksome to municipal councils, their legal subservience in itself does not seem to have been an issue.

During the first thirty years after the Baldwin Act the municipal law system was more or less synchronized with economic and social reality. That there is now a mismatch seems incontrovertible. We can speculate that divergence in interest may have been the product of or at least co-relative to the social and economic transformation of the late nineteenth and early twentieth century.⁹⁰⁸ When industrialization became the goal for Ontario towns and cities, the commonality of interest in the previously more homogenous market economy was disrupted. Similarly, the accompanying population surge in urban areas resulted in a growing asymmetry in

⁹⁰⁷ See generally Nelken, “Using the Concept of Legal Culture.”

⁹⁰⁸ See, for example, Robert Craig Brown and G. Ramsay Cook, *Canada, 1896-1921: A Nation Transformed* (Toronto: McClelland and Stewart, 1974).

‘local’ problems of health and welfare. Eventually, a powerful metropolis that wanted to be more powerful, and its political allies, were able to force significant changes to the low constitution, culminating in the current state of affairs, wherein the City of Toronto is entirely removed from the Municipal Act, although not from its subordinate legal status as a municipal corporation.⁹⁰⁹ The agitation to remove the metropolis, with or without other cities, even further from the confines of the low constitution continues, albeit sporadically, and without much likelihood of success. Lack of local government autonomy is embedded in a constitutional model that crystallized in a vastly different political context.⁹¹⁰

In this study I have attempted to show that the law relating to mid-Victorian municipal corporations in Canada West/Ontario was multiplistic; the letter of the law contained in the text of the foundational statute is only a small part of a rhizomatic network of legislation, case-law, interpretive manuals, local experience and the political process of law reform through petitioning.⁹¹¹ Yet the matrices of legal and local power in terms of initiative and immunity and the experience of municipal councils suggest that agency, rather than autonomy, should be the goal for reformers. What is it that twenty-first century municipalities want to do? How much does it matter if they are able to do so directly, with their own levers of law? How important is legal structure vis à vis political will? I do not argue that structure is unimportant, but I have attempted to show in this dissertation that agency within the system may be the better question. As the positive side of this argument, I suspect that it was in large part owing to their power of

⁹⁰⁹ City of Toronto Act, 2006, S.O. 2006 c.11, Schedule A.

⁹¹⁰ And as Andrew Sancton has argued, the variability of urban boundaries militates against structural reform. Any attempt to change the low constitution by carving out further exceptions would soon be out of sync with geographic reality: Sancton, *The Limits of Boundaries*.

⁹¹¹ Rhizomatic is defined by the Oxford Online Dictionary as an adjective originally derived from biology (rhizomatous) but given a second, figurative meaning “(originally Philosophy): Resembling an interconnected, subterranean network of roots. Hence: non-hierarchical, interconnected.”: <https://en.oxforddictionaries.com/definition/rhizomatic>.

initiative that mid-Victorian local governments had little power of immunity. The paucity of other agencies of government with the ability to initiate (such as central departments of civil service), and the amount of perceived demand for initiative, militated against immunity for low governments.

There is much about these local governments and their legal environment that I have not explored. Nevertheless, I am confident in concluding that that during the years 1850-1880, the municipal corporations of Canada West/Ontario were not merely integrated in, but also integral to the governance of the province. Simply put, they were too important to be autonomous.

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